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No. ——

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In the Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN AIRLINES, INC., PETITIONER

v.

SCOTT DAVIES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employee covered by a Railway Labor Act ("RLA") collective bargaining agreement may circumvent the RLA's exclusive grievance and arbitration procedures for "minor disputes" by bringing a state-law action for wrongful discharge in violation of public policy.

2. Whether a state-law cause of action for wrongful discharge alleging retaliation for union organizing activities is preempted by Sections 2 Third and Fourth of the RLA, which prohibit carrier interference with employee rights to organize and select bargaining representatives.

LIST OF INTERESTED PARTIES

Petitioner American Airlines, Inc. is a wholly-owned subsidiary of AMR Corporation, a publicly traded Delaware corporation headquartered in Texas. American has no non-wholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 971 F.2d 463 (App. 1a-14a). The opinion of the district court (App. 15a-19a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1992. American's timely petition for rehearing was denied on September 8, 1992. (App. 40a-41a). On November 30, 1992, Justice White extended the time within which to file a petition for a writ of certiorari to and including December 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI, Clause 2 of the Constitution, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .

The pertinent sections of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* and the Labor-Management Relations Act, 29 U.S.C. §§ 141 *et seq.* are reproduced at App. 56a-64a.

STATEMENT OF THE CASE

A. Factual Background

Respondent Scott Davies was employed by American Airlines, Inc. ("American" or "the Carrier") as an airline mechanic at the Carrier's Tulsa, Oklahoma maintenance base. The terms and conditions of Davies' employment were governed by the collective bargaining agreement negotiated by American and his bargaining representative, the Transport Workers Union of America ("TWU") pursuant to the Railway Labor Act ("RLA"). Appendix B to that collective bargaining agreement (the "TWU Agreement") incorporates by reference American's rules, regulations and procedures. (App. 53a). Article 28 of the TWU Agreement prohibits discharge except for just cause. (App. 43a).

In October 1989, Davies placed an advertisement in a Tulsa newspaper to publicize a debate between the TWU and a rival union of which Davies was a member. The heading he used for the advertisement was: "AMERICAN AIRLINES." (App. 21a, 25a). Davies was counseled for that action because using American's name in that fashion violated the Carrier's regulation requiring prior authorization for any use of American's name in public. It also violated American's policy of strict neutrality with respect to inter-union disputes by

making American appear to be sponsoring the debate and thus interfering in union matters. (App. 26a). By doing so, Davies put American at risk of legal action under Sections 2 Third and Fourth of the RLA, 45 U.S.C. § 152 Third and Fourth, for interfering with its employees' rights to organize and select bargaining representatives.

In accordance with American's counseling procedures (App. 54a-55a), Carrier representatives met with Davies three times in an effort to secure his agreement not to use American's name in similar fashion in the future. (App. 28a-31a). Davies contended that the heading "AMERICAN AIRLINES" was meant to refer to all airlines in the United States, and he refused to refrain from using that wording. He further contended that American was interfering with union organizing activity. (App. 29a-30a). American thereafter issued Davies a "Career Decision Day Advisory," the final step of its counseling procedures. In accordance with those procedures, the Advisory gave Davies one day off with pay to decide whether (1) to agree to comply with all rules and regulations; (2) to resign with severance benefits, or (3) to be discharged with full grievance rights. The following day, October 20, 1989, Davies refused to respond to the Advisory, and was discharged. (App. 22a-23a, 30a-31a).

Davies grieved his discharge pursuant to the grievance and arbitration procedures set forth in Article 31 of the TWU Agreement. (App. 44a-45a). On January 16, 1990, in accordance with the RLA and Article 32 of the Agreement (App. 46a-52a), Davies' discharge was arbitrated before a statutory three-person System Board of Adjustment chaired by a neutral arbitrator. The System Board held a full hearing on the question of whether Davies had been discharged for just cause and, if not, what the remedy should be. Davies was represented at the hearing by a TWU official (App. 21a). The Board heard testimony from five witnesses, two on behalf of

American, and three witnesses, including Davies, on his behalf.

The Board, in a written opinion (App. 20a-39a), sustained Davies' discharge for just cause. It concluded that Davies had been apprised of the consequences that can result from unauthorized use of American's name, particularly with reference to inter-union disputes. Nevertheless, he refused to admit error or to commit to avoiding such action in the future. The Board also concluded that Davies had offered a "blatantly absurd" excuse for his actions, namely that by using the words "American Airlines" in the advertisement he was not referring to American, but to all airlines in the United States. Under these circumstances, the Board found there was just cause under the TWU Agreement for the Carrier's decision to discharge him. (App. 36a-39a).

B. The District Court's Decision

On October 20, 1989, the day he was discharged, Davies filed this lawsuit against American in the United States District Court for the Northern District of Oklahoma. The complaint alleged that American was threatening to discharge Davies in retaliation for his union activities. After his discharge, he amended the complaint to state a cause of action for wrongful discharge in violation of a public policy against employer interference with union organizing activities, and a separate cause of action under Sections 2 Third and Fourth of the RLA based on the same facts. Davies invoked the district court's jurisdiction under those sections of the RLA, and sought both reinstatement and damages. Davies then filed a second amended complaint, voluntarily dropping the RLA claim but maintaining the state-law cause of action based on diversity jurisdiction. In that complaint, he sought damages but not reinstatement.

Following the district court's denial of American's motions to dismiss and for summary judgment, the case went to trial on the wrongful discharge claim. A jury

rendered a verdict in Davies' favor, awarding him $81,000 in actual damages and $15,000 in punitive damages. The district court then granted American's motion for judgment notwithstanding the verdict. The court held that Oklahoma's judicially-created cause of action for wrongful discharge was limited to at-will employees; since Davies could not be discharged except for just cause, he was not an at-will employee and could not bring the claim. The court further held that Oklahoma's cause of action was unavailable to Davies because he had a remedy under the Railway Labor Act. (App. 18a-19a).

C. Decision of the Court of Appeals

The court of appeals reversed. (App. 2a). It ruled that Davies could bring a state claim for wrongful discharge in violation of a public policy against employer interference with union organizing activities notwithstanding the arbitration award sustaining his discharge for just cause. The court held that the action was not precluded as a "minor dispute" controlled by the grievance procedure under the RLA. (App. 11a). It further held that Oklahoma would recognize the action even though Davies was not an "at-will" employee and was protected by a collectively bargained just-cause limitation on discharge. (App. 14a). The court did not address the issue of whether Davies' action was preempted by Sections 2 Third and Fourth of the RLA because American had not argued that issue to the court at that time.

The court acknowledged that, if Davies' claim presented a "minor" dispute, the arbitral remedy provided under Section 153 of the RLA, 45 U.S.C. § 153, would be exclusive. (App. 5a). The court stated that the distinguishing feature of a minor dispute is that it "may be conclusively resolved by interpreting the existing [collective bargaining] agreement." *Id.*, *quoting Consolidated Rail Corp. v. Railway Labor Executives' Ass'n* ("*Conrail*"), 491 U.S. 299, 305 (1989).

American argued that Davies' claim was a minor dispute because it required interpretation of the "just cause" provision of the TWU Agreement. The court rejected that argument based on *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), a case arising under Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185. The court ruled in *Lingle* that a state-law claim is preempted under Section 301 only if "resolution of [that claim] depends upon the meaning of a collective-bargaining agreement . . . ." 486 U.S. at 405-06. The fact that the claim might involve a parallel inquiry into "the same factual considerations as the contractual determination of whether [the employee] was fired for just cause" was insufficient to trigger preemption. *Id.* at 408.

Lingle arose under the LMRA. The court of appeals acknowledged that "RLA preemption is statutory, whereas LMRA preemption is contractual." (App. 8a). The court nonetheless found *Lingle* "just as valid" under the RLA. *Id.* at 7a. Based on *Lingle*, the court reasoned that the issue presented by Davies' claim was American's actual motivation in discharging him, irrespective of any "just cause" for discharge under the TWU Agreement. Thus, it concluded, Davies' claim did not present a minor dispute. *Id.*

Finally, the court of appeals rejected American's argument that Davies' claim was preempted as a minor dispute under the so-called "omitted case" doctrine even if it did not involve interpreting the TWU Agreement. In *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945), the Supreme Court defined "minor disputes" to include claims "founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries." American argued that Davies' claim was an "omitted case." The court of appeals rejected that argument on the grounds that the "omitted case" doctrine

allegedly had been overruled by *Conrail* and was not sound. (App. 9a).

D. Petition for Rehearing.

American's petition for rehearing argued that the court's holding on the minor dispute issue conflicted directly with this Court's decision in *Conrail* and with Tenth Circuit precedent holding state-law wrongful discharge claims preempted by federal labor law. In addition, American urged for the first time that, even if Davies' wrongful discharge claim were not preempted as a minor dispute, the court still lacked subject matter jurisdiction because state-law claims by RLA-covered employees alleging retaliation for union organizing activities are preempted by, and must be resolved exclusively under, Sections 2 Third and Fourth of the RLA.

After denying the petition for rehearing, the court of appeals granted American's motion to stay the court's mandate pending final disposition by this Court. (App. 42a).

REASONS FOR GRANTING THE PETITION

I. THE ISSUES PRESENTED HERE WARRANT REVIEW BY THIS COURT

The court of appeals' decision conflicts with decisions of this Court that define the scope of minor dispute preemption. The decision also conflicts with federal appellate decisions on the important question of the RLA's preemption of state-law retaliatory discharge claims. In doing so, moreover, the decision seriously undermines important principles of federal labor policy.

A. Importance of the Minor Dispute Preemption Issue

The court of appeals' conclusion that Davies' claim did not present a minor dispute subject to the grievance procedure conflicts directly with *Conrail*'s holding that a dispute is minor if the employer's action is "arguably justified" by the collective bargaining agreement. 491 U.S. at 307. In light of the System Board decision upholding Davies' discharge, it cannot be disputed that his discharge was arguably justified under the just-cause and counseling provisions and rules and regulations incorporated within the TWU Agreement.

Failing even to address *Conrail*'s "arguably justified" standard, the court of appeals relied instead on *Lingle*. The decision to apply *Lingle* to the RLA, a statute which has greater preemptive force than the LMRA, *cf. Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 323 (1972), creates a conflict within the courts of appeals on that issue. *See Lorenz v. CSX Transp., Inc.*, No. 91-1876, 1992 U.S. App. LEXIS 30973 at * 15 (4th Cir. Nov. 24, 1992); *Grote v. Trans World Airlines*, 905 F.2d 1307, 1309-10 (9th Cir.), *cert. denied*, —— U.S. ——, 111 S. Ct. 386 (1990). The decision further conflicts with an unbroken line of court of appeals decisions holding state-law retaliatory discharge claims preempted under the RLA. *See Grote*, 905 F.2d at 1310; *Mayon v. Southern Pac. Transp. Co.*, 805 F.2d 1250, 1253 (5th Cir. 1986), *cert. denied*, 488 U.S. 925 (1988); *Graf v. Elgin, J. & E. Ry.*, 790 F.2d 1341, 1348 (7th Cir. 1986); *Minehart v. Louisville & N. R.R.*, 731 F.2d 342, 345 (6th Cir. 1984).

This case is important not only because of these conflicts but because of the federal labor policies they implicate. First, the court of appeals carves out an exception to the jurisdiction of the statutory adjustment boards that is potentially enormous. Virtually all states now

recognize a cause of action for wrongful discharge in violation of public policy. *See* Henry H. Perritt, Jr., 1 *Employment Dismissal Law and Practice* 26-66 (3d ed. 1992), and cases cited therein. The public policies that are actionable are normally derived from constitutional, statutory or common law precedent. *Id.* at 5-7, 26-66, 446-57. As such, the range of policies that may be invoked to support a wrongful discharge claim is virtually unlimited. Every grievant will have the same incentive: there would be nothing to lose by "trying out" arbitration, and, if unsuccessful, reformulating that claim into a public policy violation.[1]

In addition to creating a dangerously large loophole in adjustment board jurisdiction, the effect of permitting such "free bites" in arbitration will be to undermine the authority and efficacy of the statutory adjustment boards. This Court has repeatedly rejected such a scenario, recognizing the inherent conflict with the RLA's structure and purpose.

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[1] In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Court held that a claim of discrimination under Title VII of the Civil Rights Act of 1964 was not precluded merely because an employee had arbitrated the validity of a discharge. However, that decision reflects an accommodation of one federal law to another federal law, a question far removed from that of the preemption of state common law wrongful discharge actions under the Supremacy Clause. Congress has the freedom to determine when claims may be asserted outside of arbitration; states do not. This point, which also applies to the LMRA, applies with special force under the RLA.

Similarly, as discussed *infra*, some discharge cases alleging carrier interference with union organizing activities may state an independent claim under Sections 2 Third and Fourth of the RLA. However, the very determination of whether such a case falls within the exclusive jurisdiction of an adjustment board or into one of the limited classes which does not is a matter of federal law and federal labor policy.

> To say that the discharged employee may litigate the validity of his discharge in a common-law action for damages after failing to sustain his grievance before the Board is to say that Congress planned that the Board should function only to render advisory opinions, and intended the Act's entire scheme for the settlement of grievances to be regarded "as wholly conciliatory in character, involving no element of legal effectiveness, with the consequence that the parties are entirely free to accept or ignore the Board's decision . . . [a contention] inconsistent with the Act's terms, purposes and legislative history." *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 720-721.

Union Pac. R.R. v. Price, 360 U.S. 601, 617 (1959). *See also Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 94 (1978) (dismissing wrongful discharge claim; "The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations.")

Finally, assuming *arguendo* that *Lingle* applies under the RLA, the court of appeals misapplied it in a manner that invites state courts and juries to interpret and construe collective bargaining agreements—a role from which they are excluded under the RLA. The court's conclusion that the only issue was American's *motivation* in discharging Davies, *i.e.*, whether American was motivated by anti-union animus, ignores the fact that a jury would have to decide whether the Carrier's asserted contractual basis for discharging Davies was pretextual. This inquiry entails addressing whether Davies in fact violated the TWU Agreement and, if so, how consistently American has applied its disciplinary procedures to such violations. The fact that a jury passes on such questions in the context of the employer's *defense* to a wrongful discharge claim, rather than the claim itself, does not in any way lessen the conflict with federal labor policy, which mandates that such issues be committed exclusively to arbitration.

B. Importance of the Sections 2 Third and Fourth Preemption Issue

The conflict with federal labor policy is heightened in this case because the particular public policy that Davies invokes is one that arises out of the RLA: the prohibition in Sections 2 Third and Fourth against carrier interference in employee organization and the selection of bargaining representatives. This prohibition lies at the very core of the RLA and preempts parallel and overlapping state causes of action.

No decision of this Court or any court of appeals has directly addressed the preemptive effect of Sections 2 Third and Fourth, and the RLA generally, over state-law claims for interference with bargaining and representational rights. Two district courts, however, have held such claims preempted.[2] Moreover, two courts of appeals that have addressed the same issue in cases arising under the LMRA, a statute with less preemptive force, have held that such claims must be preempted in order to avoid the danger of state interference with the application of a consistent and uniform national labor policy. *Platt v. Jack Cooper Transp. Co.*, 959 F.2d 91 (8th Cir. 1992); *Viestenz v. Fleming Cos.*, 681 F.2d 699 (10th Cir. 1982), *cert. denied*, 459 U.S. 972 (1982). The need for consistency and uniformity is even more important under the RLA, which is premised on company-wide (and thus in many cases nationwide) bargaining units, collective bargaining representatives, and bargaining obligations.

The RLA's exclusive regulation of representation disputes and its prohibition against carrier interference are central to the workings of the Act. Congress committed the resolution of representation disputes to the jurisdic-

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[2] *Tipton v. Aspen Airways*, 741 F. Supp. 1469, 1472 (D. Colo. 1990); *Calhoun v. Evergreen Int'l Airlines*, No. C 86-0551-L(B) (W.D. Ky. Oct. 24, 1986), *rev'd on other grounds*, 828 F.2d 19, 1987 U.S. App. LEXIS 11702 at *2-3 (6th Cir. 1987).

tion of the National Mediation Board ("NMB") except for a limited class of cases involving carrier interference encompassed within Sections 2 Third and Fourth. Cases of discipline or discharge involving carrier interference either fall within the limited jurisdiction of Sections 2 Third and Fourth or are minor disputes for which resolution is exclusively committed to adjustment boards.

Congress intentionally structured the RLA to provide comprehensive and exclusive dispute resolution mechanisms covering minor disputes, representation and interference cases. The Act leaves no room for state-created common-law causes of action. Even parallel and overlapping state actions must give way because of the preemptive force of the RLA and the policy favoring a uniform national labor law.

II. THE RLA ESTABLISHES MANDATORY AND COMPREHENSIVE DISPUTE RESOLUTION PROCEDURES, SUPPORTED BY LIMITED FEDERAL CAUSES OF ACTION

Congress enacted the RLA to stabilize labor-management relations in rail and air transportation by providing mandatory procedures for the orderly and peaceful resolution of disputes between carriers and employees. 45 U.S.C. § 151(a). These statutory procedures address the three primary classes of disputes that typically resulted in labor-management discord: bargaining (or so-called "major") disputes, grievances ("minor" disputes), and representation disputes.

Major disputes, involving attempts to change rates of pay, rules, or working conditions, 45 U.S.C. § 155 First, are to be resolved by an elaborate process involving advance notice, conference, mediation, arbitration, and possibly emergency presidential intervention. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). Minor disputes, which involve "disputes between an employee or group of employees and a carrier

. . . growing out of grievances or out of the interpretation or application of agreements" are to be resolved through binding arbitration before an adjustment board whose awards are enforceable in the district courts. 45 U.S.C. § 153 First(i), (m), (p), § 184. "Representation" disputes, which involve controversies over the designation of collective bargaining representatives, are committed to the exclusive jurisdiction of the NMB. 45 U.S.C. § 152 Ninth; *see Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 302-04 (1943).

The representation, bargaining, and arbitration procedures of the RLA constitute a comprehensive system for the resolution of the principal controversies arising between a carrier and its employees. Each of these procedures is enforceable through federal causes of action. *See Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 581 (1971) (major dispute procedures enforceable by federal court injunction); *Conrail*, 491 U.S. at 304 (courts may enjoin strikes arising out of minor disputes); *Virginian Ry. v. System Fed'n*, 300 U.S. 515, 544-45 (1937) (carrier's duty under Section 2 Ninth to negotiate with a union certified by NMB is mandatory and enforceable). Moreover, those statutory procedures leave no room for state initiative. *See Jacksonville Terminal Co.*, 394 U.S. at 380-82 (state action which could affect major dispute procedures prohibited); *Conrail*, 491 U.S. at 304 (adjustment board jurisdiction of minor disputes is exclusive); *Switchmen's Union*, 320 U.S. at 302-04 (representation matters falling within Section 2 Ninth committed exclusively to NMB, precluding judicial action).

Sections 2 Third and Fourth of the RLA address a class of disputes which, in effect, is both a limited exception and a complement to the NMB's jurisdiction over representation cases. These provisions prohibit carrier interference with the selection of bargaining representatives and are designed to protect the representation proc-

ess. Congress deemed the freedom from such interference to be "the essential foundation of the statutory scheme," thus warranting the special statutory provisions. *See Texas & N.O. R.R. v. Ry. & Steamship Clerks*, 281 U.S. 548, 569 (1930). As with the other classes of disputes discussed above, the prohibitions established in Sections 2 Third and Fourth are mandatory and enforceable in federal court. *Id.; see also Virginian Ry.*, 300 U.S. at 544-45.

Cases involving allegations of discipline in retaliation for union activities potentially fall into two different categories: minor disputes and carrier interference cases. The federal courts have endeavored to strike a balance between their limited role in enforcing Sections 2 Third and Fourth and the exclusive jurisdiction of adjustment boards over matters involving employee discipline and discharge. *See, e.g., National R.R. Passenger Corp. v. IAM*, 915 F.2d 43 (1st Cir. 1990); *Independent Union of Flight Attendants v. Pam Am. World Airways*, 789 F.2d 139 (2d Cir. 1986); *Machinists v. Northwest Airlines*, 673 F.2d 700 (3d Cir. 1982). These cases suggest that it is not easy to define precisely the dividing point between what falls exclusively within adjustment board jurisdiction and what falls under Sections 2 Third and Fourth. What clearly emerges, however, is that the line is continuous: there is no gap to be filled by a state-law action.

The important question created by the court below results from its recognition of a state-law enforcement alternative to the detailed and comprehensive scheme of the RLA. There is no precedent or reason to interject such state-law causes of action. What the court should have done and failed to do was to apply federal law and decide either 1) that Davies' claim was a minor dispute and that the System Board was the exclusive forum for adjudicating it, or 2) that Davies' claim properly was the subject of a cause of action under Sections 2 Third and

Fourth (which Davies originally pled but withdrew), preempting his state-law claim.

When confronted with a claim that carrier discipline is the result of representation interference, the court's role is limited to determining whether it is necessary for the court to intervene under Sections 2 Third and Fourth notwithstanding the availability of a statutory grievance procedure. That determination is not a matter of state law, nor can a common-law retaliatory discharge claim be permitted to supplant Sections 2 Third and Fourth. In light of the history of the Act and its comprehensive exclusive dispute resolution mechanisms, a state common-law cause of action for wrongful discharge alleging retaliation for union activities cannot be allowed to coexist with the RLA.

III. DAVIES' CLAIM WAS PREEMPTED AS A MINOR DISPUTE UNDER THE RLA

A. The Decision Below Directly Conflicts With *Conrail* and Misapplies the Court's Prior Decision in *Lingle*

In its recent *Conrail* decision, the Court established a test for determining when a dispute is "minor" and thus exclusively committed to an adjustment board.

> Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major.

Conrail, 491 U.S. at 307. Applying *Conrail*, Davies' wrongful discharge claim must be preempted because the Carrier's disputed action—the discharge—is without question "arguably justified" under the TWU Agreement. The decision of the System Board of Adjustment precludes a contrary conclusion. Even without the benefit of the System Board award, however, Davies' claim alleg-

ing he was improperly discharged falls squarely within the definition of a minor dispute as set forth in *Conrail*. *See Polich v. Burlington Northern*, 942 F.2d 1467, 1470 (9th Cir. 1991) (under *Conrail*, claim is preempted if the carrier seeks to defend its conduct as justified by the terms of the collective bargaining agreement).

The court of appeals properly acknowledged *Conrail* as this Court's latest word on what constitutes a minor dispute. (App. 5a). Having identified the governing authority, however, the court failed to apply it. Indeed, the court did not discuss or even refer to the "arguably justified" test. Instead, as noted above, it relied solely on *Lingle*. That reliance was erroneous. First, *Lingle* predates *Conrail*, and is irreconcilable with *Conrail*'s "arguably justified" test. Second, *Lingle* arose under Section 301 of the LMRA. Arbitration under the LMRA is voluntary and a matter of contractual undertaking between the parties. By contrast, the RLA embodies *compulsory* dispute resolution provisions. Based on that distinction, this Court has recognized that preemption under the RLA is if anything broader than under Section 301. *Andrews*, 406 U.S. at 323.

Even if *Lingle* were the standard for RLA preemption, the court of appeals misapplied its teaching. As discussed above, *Lingle*'s test for LMRA preemption is whether the "*resolution*" of the state-law claim requires construing the collective bargaining agreement. 486 U.S. at 405-06. In *Lingle*, resolution of the state-law claim did not require construing the agreement because neither the claim *nor the employer's defense* involved terms of the agreement. The employee alleged that she had been discharged in retaliation for filing a worker's compensation claim. The employer's defense was that she was discharged for filing a *false* claim. That defense did not require interpreting the collective bargaining agreement. Consequently, *reso-*

lution of the claim did not implicate the agreement, and the claim was not preempted.

That is not this case, however. American's defense both to Davies' grievance and his wrongful discharge claim is based on the collective bargaining agreement: that Davies violated regulations and policies concerning the use of American's name and its neutrality in union disputes, and refused to commit to comply with them in the future pursuant to American's counseling procedures, all of which are part of the TWU agreement.[3] Davies argued that his discharge in fact was motivated by his union activity. In determining the issue of motivation, however, the jury necessarily had to consider American's contractual defense in order to determine if that defense was merely a pretext for antiunion animus. Theoretically, direct evidence of antiunion animus could negate the need to make that inquiry. Such a case is rare in the practical world of labor relations, however. As in *Davies*, proof of illegal animus is almost always based on indirect evidence, thus requiring a factfinder to assess the validity of the employer's contractual reasons for its action. *Cf. Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) (proof of intentional discrimination by indirect evidence involves *prima facie* case by plaintiff, articulation of legitimate reason by employer, and proof by plaintiff that legitimate reason is not worthy of credence or is mere pretext for discrimination).

In this case, the jury necessarily considered whether Davies did in fact violate American's regulations and procedures, and if so, whether the discipline imposed was

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[3] American's rules and regulations are incorporated into the Agreement by reference in an Appendix that is explicitly made part of the TWU Agreement. (App. 53a). Even if that were not the case, those rules and regulations are also part of the "common law" of the shop that is exclusively committed to arbitral resolution. *See, e.g., Conrail*, 491 U.S. at 311-12.

consistent with other cases involving similar violations. These inquiries are precisely the issues that are submitted to arbitration. Federal labor policy is equally violated when a jury interprets a collective bargaining agreement in the context of a defense to a state-law claim as it is when the jury does so in evaluating the claim itself. *Lingle* does not anticipate state courts and juries interpreting collective bargaining agreements in any context—that function is properly for the arbitrator.

The policy favoring arbitration is so strong in the RLA and the opinions of this Court that the decision below must be corrected to ensure that the statutory arbitration procedure is not weakened by an inappropriate expansion of the narrow exception created under the LMRA in *Lingle*. This Court, and Congress, never intended to cede to the state courts independent jurisdiction to determine whether the employer's contractual basis for discipline was erroneous.

B. The "Omitted Case" Doctrine Enunciated in *Burley* Was Not Overruled in *Conrail*

The court below also made an important error when it dismissed the so-called "omitted case" doctrine. Years ago, this Court in *Burley* defined the breadth of cases exclusively committed to adjustment boards under the RLA and included those in which the claim is founded upon "some incident of the employment relation or asserted one, independent of those covered by the collective agreement . . ." *Burley*, 325 U.S. at 723. *See also Leu v. Norfolk & W. Ry.*, 820 F.2d 825, 829 (7th Cir. 1987), and cases cited therein.

The court of appeals identified the "omitted case" doctrine, but concluded that the rule, in material part, "appears to have been overruled by *Conrail*." (App. 9a). That conclusion is wrong and causes the potential for great mischief in the process of day-to-day labor rela-

tions. *Conrail* expressly relied on *Burley* in distinguishing major from minor disputes. *See* 491 U.S. at 302-03. Indeed, the *Conrail* opinion *quoted*, with evident approval, the entire passage in *Burley* that established the "omitted case" rule. *Id.* at 303.

Moreover, *Conrail* itself represents an application of one form of "omitted case." This Court held that the dispute in *Conrail* was minor even while expressly recognizing that neither party relied on any provision of the collective bargaining agreement, which was not even part of the record before the Court. *Id.* at 311. The Court observed that collective bargaining agreements include implied terms based upon practice, usage, and custom. Those terms ultimately create a common law of the particular industry or plant that "covers the whole employment relationship." *Id.* at 311-12. The elimination of the omitted case doctrine improperly circumscribes arbitration procedures in an industry where established labor-management relationships depend to a large extent on rules and practices that supplement and fill out the formalized written agreements.

C. The Decision Below Conflicts With Court of Appeals Decisions Holding State-Law Retaliatory Discharge Claims Preempted

This Court has not directly addressed whether a state claim of wrongful discharge in violation of public policy constitutes a minor dispute preempted by the RLA. However, the Ninth Circuit so held in *Grote*, a post-*Lingle* retaliatory discharge case. In *Grote*, an airline pilot alleged that he was discharged in retaliation for refusing his employer's demand to perjure himself to the Federal Air Surgeon in order to obtain medical recertification after a heart attack. The Ninth Circuit found the plaintiff's claim to be "arguably governed" by a part of the collective bargaining agreement dealing with the carrier's ability to require any of its pilots to maintain a current

medical certificate. Moreover, the court found that because the plaintiff's "entire claim is in response to an alleged wrongful termination . . . 'the gravamen of [his] complaint is wrongful discharge.'" 905 F.2d at 1309, *quoting Lewy v. Southern Pac. Transp. Co.*, 799 F.2d 1281, 1290 (9th Cir. 1986).

Although *Grote* is the only court of appeals case addressing this issue after *Lingle*, its holding is consistent with the decisions of all the circuit courts that considered the preemptive effect of the RLA over state-law retaliatory discharge claims before *Lingle*. *See Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1054 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Minehart*, 731 F.2d at 345; *Mayon*, 805 F.2d at 1253; *Graf*, 790 F.2d at 1348.[4] The conflict created by the decision below needs to be resolved, and resolved promptly, before discharged employees routinely clothe their grievances in public policy dress in order to present them to juries in state-court actions or federal diversity suits. The rules must be clear, and only this Court can make them so.

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[4] The decision below also conflicts with circuit court decisions holding other kinds of wrongful discharge claims preempted. *See, e.g., Hodges v. Atchison, T. & S.F. Ry.*, 728 F.2d 414, 417 (10th Cir.) (RLA preempts wrongful discharge action based on breach of common law contract), *cert. denied*, 469 U.S. 822 (1984); *Magnuson v. Burlington Northern*, 576 F.2d 1367, 1369 (9th Cir. 1978) (complaints of wrongful discharge are minor disputes); *Edelman v. Western Airlines*, 892 F.2d 839, 844-45 (9th Cir. 1989) (wrongful discharge claim preempted by RLA). *Cf. Zimmerman v. Atchison, T. & S.F. Ry.*, 888 F.2d 660, 662 (10th Cir. 1989) (RLA preempts wrongful demotion claim).

IV. THE RLA PREEMPTS STATE-LAW CLAIMS ALLEGING WRONGFUL DISCHARGE FOR UNION ORGANIZING ACTIVITY

Even if the court of appeals were correct in concluding that Davies' claim was not preempted as a minor dispute, the court should not have permitted Davies to proceed on a state-law "public policy" claim alleging retaliation for union organizing activities. Such a claim is preempted by the RLA generally, and in particular by the federal remedy created by Sections 2 Third and Fourth.[5]

American is unaware of any Supreme Court or court of appeals decision directly addressing the preemptive effect of Sections 2 Third and Fourth over state-law claims of wrongful discharge based on alleged retaliation for union organizing activities. However, based upon closely analogous preemption principles enunciated in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), the decision below makes a significant error that disrupts a sensitive and important labor policy concerning the regulation of representation disputes. According to *Garmon*, Congress forbade the states from regulating conduct "arguably prohibited" or "arguably protected" by the LMRA, in order to avoid the danger of state interference with national labor policy. State regulation may survive only where the issue is of "peripheral concern" to the LMRA, or where the conduct in question is so "deeply rooted in local feeling

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[5] Although American did not raise the preemptive effect of Sections 2 Third and Fourth until it filed its petition for rehearing, this is an important jurisdictional issue that this Court can and should address on writ of certiorari. *See Louisville & N. R.R. v. Mottley*, 211 U.S. 149, 152 (1908) (Court *sua sponte* remitted case to circuit court for dismissal for lack of jurisdiction even though neither party raised issue; "it is the duty of this court to see to it that the jurisdiction of the circuit court . . . is not exceeded."); *Glidden Co. v. Zdanok*, 370 U.S. 530, 536-37 (1962) (jurisdictional matters not raised "at the earliest practicable opportunity . . . may be questioned on direct review for the first time in this Court.").

and responsibility that, in the absence of compelling congressional direction, [this Court] could not infer that Congress had deprived the States of the power to act." *Id.* at 243-44. *See, e.g., Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290 (1977) (claim of outrageous conduct actionable even if underlying discrimination arguably prohibited by the LMRA); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (similarly, malicious libel action); *cf. Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957) (pre-*Garmon*; violent and coercive picketing actionable under state law).

Garmon provides a perspective from which to understand the significance of the court of appeals' error. The perceived need for uniform national labor policy under the LMRA is even more compelling under the RLA, particularly with respect to activities that affect the selection of bargaining representatives. The RLA was the 1926 legislative enactment of an agreement between leaders of railroad unions and the carriers. *Texas & N.O. R.R.*, 281 U.S. at 563. The purpose of the law was to ensure labor peace in a highly integrated rail industry critical to the economic well-being of the nation. *Id.* at 561-64. Congress intended uniform labor policies to apply in the rail and air industries. *See, e.g., Kidd v. Southwest Airlines*, 891 F.2d 540, 545 n.4 (5th Cir. 1990). State causes of action to enforce organizing rights would leave carriers and employees with a patchwork of inconsistent obligations, rights and remedies. *Cf. Jacksonville Terminal Co.*, 394 U.S. at 381 (applying *Garmon* under RLA even where state regulation was in furtherance of federal scheme, due to need for uniformity). Consideration by this Court is necessary to preserve the objectives of the RLA.

At least two district courts have held that state-law wrongful discharge claims based on union organizing by RLA-covered employees are preempted by the RLA. *See*

Tipton, 741 F. Supp. at 1472;[6] *Calhoun*, 1987 U.S. App. LEXIS 11702 at * 2-3. *Contra*, *Clift v. United Parcel Serv., Inc.*, 133 L.R.R.M. (BNA) 2639 (W.D. Ky. 1990). Moreover, both the Eighth and Tenth Circuits have addressed the preemptive effect of the LMRA over wrongful discharge claims based on union activities. *See Viestenz; Platt.* Both cases applied *Garmon* preemption principles to hold the state-law claims preempted. Preemption of such claims is necessary to avoid the danger of state interference with national labor policy. 681 F.2d at 701-02. "This preemption doctrine is premised on Congress' desire to avoid conflicting rules of substantive law and remedy, thereby ensuring a consistent national labor policy." *Id.* at 702, *citing Garmon*, 359 U.S. at 242.[7]

Both *Viestenz* and *Platt* addressed the applicability of the "local interests" exception to *Garmon* recognized in *Farmer*. Both cases concluded that where the only inquiry under the state claim is wrongful discharge—the same inquiry that would be presented to the federal court under the federal claim—there can be no exception for local interests. As stated in *Farmer*, "concurrent state-court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme." 430 U.S. at 305.

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[6] The *Tipton* court does not explicitly refer to Section 2 Fourth as the source of preemption. However, the cases it cites are Section 2 Fourth cases, and the court's analysis implicitly relies on Section 2 Fourth in the context of the overall preemptive force of the RLA.

[7] In *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988), the Ninth Circuit held that the preemptive power of Sections 2 Third and Fourth was not so powerful as to warrant *removal* of a state-law action for wrongful discharge for engaging in union activities under the doctrine of "complete preemption." However, the court explicitly stated that it expressed no opinion on the merits of the preemption defense itself, declaring its confidence in the ability and willingness of state courts to enforce federal defenses. *Id.* at 876.

> Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.

Id. Davies' claim fails this test in every respect. His claim rises or falls on the alleged "discrimination," *i.e.*, his allegation that he was discharged in retaliation for his union activities. His claim is in no way "unrelated" to that alleged discrimination, nor did he or could he allege that his discharge was accomplished in any abusive manner (*cf. Farmer*, where the alleged discrimination was accompanied by threats and intimidation and by allegations of outrageous conduct beyond the bounds of decency and civilized society).

Sections 2 Third and Fourth complement the exclusive representation dispute procedures of Section 2 Ninth. There is no room for state-by-state enforcement of the organizational rights of RLA employees, especially where local enforcement is at odds with a carefully constructed federal scheme that includes arbitration and special complementary federal remedies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

U.S. COURT OF APPEALS
TENTH CIRCUIT
(DENVER)

No. 90-5231

DAVIES

v.

AMERICAN AIRLINES, INC.

July 13, 1992

Appeal from the U.S. District Court for the Northern District of Oklahoma. Reversed and remanded.

Gary G. Grisso (Joe L. White, with him on brief), Collinsville, Okla., for appellant.

Reuben Davis (Frederic N. Schneider III, Kimberly A. Lambert, and Boone, Smith, Davis, Hurst & Dickman, with him on brief), Tulsa, Okla. for appellee.

Before ANDERSON and EBEL, Circuit Judges, and ANDERSON, Senior District Judge.*

Full Text of Opinion

EBEL, Circuit Judge:—This appeal arises out of a claim, based upon Oklahoma law, for wrongful termination of employment in violation of public policy. *See*

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* The Honorable Aldon J. Anderson, Senior District Judge of the United States District Court for the District of Utah, sitting by designation.

Burk v. K-Mart Corp., 770 P.2d 24, 28-29 (Okla. 1989). Three issues are raised: First, is this state law action a "minor" dispute within the exclusive jurisdiction of an arbitral board under the Railway Labor Act ("RLA")? Second, does Oklahoma law provide a remedy for wrongful termination in violation of public policy where other remedies are available? Third, does Oklahoma law provide a remedy for wrongful termination in violation of public policy for employees who can only be terminated for "just cause"?

We conclude that this cause of action is not a "minor" dispute under the RLA and, hence, the district court had jurisdiction to decide the case. On the merits, we conclude that Oklahoma would recognize the tort of wrongful termination in violation of public policy even if other remedies are available to the employee and even if he can be terminated only for "just cause." Accordingly, we reverse the district court's grant of the Defendant's motion for judgment notwithstanding the verdict ("JNOV") and we remand to reinstate the jury verdict.

FACTS

The Plaintiff, Scott Davies, was employed as a mechanic by the Defendant, American Airlines ("American"), in Tulsa, Oklahoma. His employment was governed by the terms of a collective bargaining agreement ("CBA") between American and the Transport Workers Union ("TWU"), the exclusive bargaining agent for American's mechanics. Under the CBA, Davies could be discharged only for "just cause."

Davies sought to change the mechanics' representation to the Aircraft Mechanics Fraternal Association ("AMFA"), a rival of the TWU. To this end, he placed an advertisement in a local newspaper announcing a debate between representatives of the two unions. American approached Davies after the publication of the advertisement and reprimanded him for using the words

"American Airlines" in the advertisement without permission from American. According to American, the use of its name in the advertisement erroneously made American appear to be a sponsor of the debate. American's position was that the advertisement was false, in violation of its Employment Rule 21, and harmful to the welfare of the company, in violation of its Employment Rule 24. When Davies refused to acknowledge his alleged wrongdoing and refused to promise that he would not repeat it, American terminated his employment. In arbitration, it was found that Davies had violated American's rules and that, therefore, American had "just cause" to discharge him. However, the arbitrator did not address the issue of whether the discharge violated clearly established public policy and therefore was actionable under *Burk*.

Prior to the disposition of the arbitration, Davies sued American based upon *Burk*, which provides a right of action to employees who are discharged in violation of public policy. Davies argues that even if he did violate American's rules, thereby giving American "just cause" to discharge him, American's actual motivation for the discharge was not to stop his violations of its rules, but rather to stop his unionizing activity. Because public policy supports the right to select union representation, Davies argues, his discharge violated public policy and entitled him to recover under *Burk*. The jury agreed that American was motivated by anti-union animus and returned a verdict in favor of Davies.

American moved for JNOV on three bases. First, American argued, Davies' *Burk* action is a "minor" dispute under the RLA. Because the RLA vests mandatory and exclusive jurisdiction over "minor" disputes in an arbitral board, American argued, the courts are preempted from hearing such disputes. Second, American argued, *Burk* does not provide a cause of action for violation of a public policy which already has a remedy available for enforcement. Third, American argued,

Burk is limited to "at will" employees and does not provide a cause of action for employees like Davies who can only be discharged for "just cause." The district court granted JNOV for American based on its last two arguments. Davies appeals that decision.

I. RLA Preemption [1]

Although the district court's grant of JNOV was not based upon RLA preemption, American continues to urge this argument as a ground for affirmance. RLA preemption is jurisdictional. *See Zimmerman v. Atchison, T. & S.F. Ry.*, 888 F.2d 660, 661 (10th Cir. 1989) (per curiam). Accordingly, we address this argument first.

The RLA provides an arbitral forum for the resolution of "disputes between an employee . . . and a carrier . . . growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. §§ 153 First (i) & 184.[2] Such disputes have been characterized as

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[1] By "preemption" we refer to forum preemption. As explained below, the RLA vests exclusive and mandatory jurisdiction over certain claims in an arbitral forum and gives the courts only extremely limited powers of review over decisions of the arbitral board. This doctrine is not the same as the doctrine of field preemption, which addresses whether Congress has explicitly or implicitly (by pervasive and comprehensive regulation) precluded states from regulating a particular area of conduct.

[2] The RLA was extended to cover the airlines by 45 U.S.C. §§ 181 to 188. The mediation and arbitration procedures differ somewhat in the air carrier context as opposed to the railroad context. However, we have regularly looked to § 153 railway preemption cases in determining the scope of preemption in the air carrier context under § 184. *See, e.g., Barnett v. United Air Lines*, 738 F.2d 358, 361-62 (10th Cir.), *cert. denied*, 469 U.S. 1087, 105 S.Ct. 594, 83 L.Ed.2d 703 (1984). Accordingly, we do not distinguish between the two contexts for purposes of preemption.

Although § 153 does not contain a comma after the word "grievances," we include the comma because it does appear in § 184, the air carrier statute.

"minor" disputes. *See Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 321-22, 92 S.Ct. 1562, 1563-64, 32 L.Ed. 2d 95 (1972).

In *Andrews*, the Supreme Court held that the arbitral remedy provided under section 153 of the RLA is mandatory and exclusive for "minor" disputes. *Id.* at 322, 325, 92 S.Ct. at 1564, 1565. Thus, if Davies' *Burk* action can be characterized as a "minor" dispute, then the courts generally lack jurisdiction to hear it. *Barnett v. United Air Lines*, 738 F.2d 358, 361 (10th Cir.) *cert. denied*, 69 U.S. 1087, 105 S.Ct. 594, 83 L.Ed.2d 703 (1984).[3]

The distinction between "major" and "minor" disputes was elaborated upon in *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 109 S.Ct. 2477, 105 L.Ed.2d 250 (1989) (*"Conrail"*). "The distinguishing feature of [a 'minor' dispute] is that the dispute may be conclusively resolved by interpreting the existing [collective bargaining] agreement." *Id.* at 305, 109 S.Ct. at 2481.

A. *The Need for CBA Interpretation*

American argues that Davies' *Burk* suit is a "minor" dispute because it requires interpretation of an existing CBA. Specifically, American argues that its defense to the suit—i.e., that Davies was fired for "just cause"—requires interpretation of the "just cause" provision of the CBA. Thus, American argues, this suit is preempted. *See Andrews*, 406 U.S. at 324, 92 S.Ct. at 1565; *Zimmerman*, 888 F.2d at 662; *Barnett*, 738 F.2d at 361.

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[3] Federal courts can, under some circumstances, review the findings and order of the arbitrator. *See* 46 U.S.C. § 153 First (q) (court can set aside order where the arbitrator fails to comply with requirements of RLA, lacks jurisdiction, or engages in fraud or corruption); *Barnett*, 738 F.2d at 362 (plaintiff can challenge propriety of arbitral decision if union's breach of duty of fair representation "seriously undermined the integrity of the arbitral process"). However, none of these grounds for federal court review in a "minor" dispute are at issue in the case at bar.

However, the Supreme Court rejected such an argument in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). *Lingle* involved a defense of preemption under section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Under the LMRA, like the RLA, preemption occurs "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement." *Lingle*, 486 U.S. at 405-06, 108 S.Ct. at 1881. *Lingle* involved a plaintiff who alleged she was illegally discharged in retaliation for filing a workers compensation claim. The employer disagreed with that characterization and claimed that the plaintiff was fired for "just cause" under the CBA. *Lingle* held that the plaintiff's retaliatory discharge claim under the state workers compensation laws could be tried without interpreting the CBA. Accordingly, the Court held that the claim was not preempted notwithstanding the fact that "the state-law analysis might well involve attention to the same factual considerations as the contractual determination of whether [the employee] was fired for just cause." *Id.* at 408, 108 S.Ct. at 1883.

In *Marshall v. TRW, Inc., Reda Pump Division*, 900 F.2d 1517 (10th Cir. 1990), we faced a similar situation where the plaintiff asserted he had been terminated for filing a workers compensation claim. The employer responded that the plaintiff was terminated for "just cause" under the CBA. The plaintiff responded that the "just cause" reason was pretextual. Applying *Lingle*, we held that a court could determine whether the plaintiff was terminated in retaliation for a workers compensation filing without interpreting the "just cause" provision of the CBA. *Id.* at 1521. Even if the employee violated the employer's rules, giving the employer "just cause" to discharge him, the question is whether the employer's motivation for the discharge was the rule violation or retaliation for an activity protected by the retaliatory discharge law. Accordingly, we held that the claim was not preempted by the LMRA. *Id.* Hence, interpreta-

tion of the "just cause" provision of a CBA is not necessary to resolve a retaliatory discharge suit.

Davies' *Burk* suit is essentially a retaliatory discharge suit. The gravamen of his action is that American's actual or primary motivation in firing him, irrespective of any "just cause" it may have had under the CBA, was to stop his unionizing activity. Thus, we hold, pursuant to *Lingle* and *Marshall*, that Davies' *Burk* action does not require interpretation of the CBA and is therefore not preempted by the RLA on that ground.[4]

American urges that *Lingle*, which dealt with the LMRA, is inapposite in the RLA context. However, we believe that the test articulated by *Lingle* for determining whether a dispute requires CBA interpretation is just as valid under the RLA as it is under the LMRA. At least four circuits have looked to LMRA cases such as *Lingle* to determine whether a claim involved CBA interpretation for purposes of RLA preemption. *See Deford v. Soo Line R.R.*, 867 F.2d 1080, 1087 (8th Cir.) (distinguishing *Lingle*), *cert. denied*, 492 U.S. 927, 109 S.Ct. 3265, 106 L.Ed.2d 610 (1989); *Beard v. Carrollton R.R.*, 893 F.2d 117, 122 (6th Cir. 1989) (same); *McCall v. Chesapeake & Ohio Ry.*, 844 F.2d 294, 304 (6th Cir.)

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[4] Appellee has cited to us the recent Eighth Circuit case of *Calvert v. Trans World Airlines, Inc.*, 959 F.2d 698 (8th Cir. 1992). However, we find that case inapposite. That case, unlike the one before us, involved a claim for intentional infliction of emotional distress and the Eighth Circuit concluded that claim could not be resolved without interpreting the CBA to determine if it justified or authorized the conduct at issue. If so, the tort claim would fail. Thus, the court concluded that the plaintiff's claims there "arise from the interpretation and application of the [CBA], and the RLA preempts [such claims] as a minor dispute. . . ." *Id.* at 700. The Tenth Circuit has drawn this same distinction, concluding that a claim for intentional infliction of emotional distress was preempted by § 301 of the Labor-Management Relations Act while recognizing that a retaliatory discharge claim would not be so preempted because it rests on a basis independent of the CBA. *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015 (10th Cir. 1990).

(Order on Rehearing) (same), *cert. denied*, 488 U.S. 879, 109 S.Ct. 196, 102 L.Ed.2d 166 (1988); *Leu v. Norfolk & W.Ry.*, 820 F.2d 825, 830 (7th Cir. 1987) (The "reasoning [of a pre-*Lingle* LMRA case] is equally applicable to the determination of whether a claim couched in terms of a state tort law actually arises under an RLA collective bargaining agreement.").

It is true, as the Supreme Court noted in *Andrews*, that RLA preemption is statutory whereas LMRA preemption is contractual. 406 U.S. at 323, 92 S.Ct. at 1564. However, we do not believe that affects the inquiry into whether a claim requires interpretation of a CBA.[5]

B. *"Minor" Disputes not Requiring CBA Interpretation: The "Omitted Case"*

American next argues that a dispute may be "minor" even where a claim does not require CBA interpretation.[6] In *Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945), the Supreme Court defined a "minor" dispute as one that

> relates *either* to the *meaning or proper application of a particular provision* [*of the CBA*] with reference to a specific situation *or* to an *omitted case*. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries.

Id. at 723, 65 S.Ct. at 1290 (emphasis added). American argues that under *Burley* we must consider an "omitted

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[5] Although the Ninth Circuit held that the statutory, as opposed to contractual, origin of the RLA affects the inquiry into whether a claim requires CBA interpretation. *Grote v. TransWorld Airlines*, 905 F.2d 1307, 1309-10 (9th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 386, 112 L.Ed.2d 397 (1990), we respectfully disagree with the reasoning of that case.

[6] Although American does not appear to urge this argument on appeal, it was urged below. *See* R. Doc. 76 at 5-10. We address this argument because it goes to our jurisdiction to hear this action.

case"—i.e., any claim "founded upon some incident of the employment relation . . . independent of . . . the collective agreement"—a "minor" dispute, preempted by the RLA.[7]

We disagree with American's "omitted case" argument for three reasons. First, *Burley*, to the extent that it can be read as holding that disputes not requiring CBA interpretation can be "minor" for preemption purposes,[8] appears to have been overruled by *Conrail*. The test developed by *Conrail* for whether a dispute is "minor" is limited to whether the dispute requires CBA interpretation. *Conrail*, 491 U.S. at 303, 109 S.Ct. at 2480.

Second, it would not make sense to extend RLA preemption to disputes that do not require CBA interpretation. As noted by Judge Posner of the Seventh Circuit, arbitrators have no particular expertise in cases that do not require CBA interpretation; thus "arbitration would have no advantage over adjudication in [such a] case." *Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807, 816 (7th

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[7] The contention that "minor" disputes include those that do not require CBA interpretation arguably finds support in the RLA's grant of jurisdiction to the arbitral board for "disputes . . . growing out of grievances, *or* out of the interpretation or application of [CBAs]." 45 U.S.C. § 184 (emphasis added). However, we believe that the "grievance" language is redundant. "Grievances" have been defined as "controversies over the meaning of an existing [CBA] in a particular fact situation, generally involving only one employee." *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 33, 77 S.Ct. 635, 637, 1 L.Ed.2d 622 (1957); *see also Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807, 814 (7th Cir. 1985) ("A 'grievance' is a claim of violation of the [CBA]"), *cert. denied*, 480 U.S. 945, 107 S.Ct. 1602, 94 L.Ed.2d 788 (1987). Thus, we do not believe that the RLA itself contemplates two distinct types of "minor" dispute.

[8] *Burley*, which dealt with the powers of a collective bargaining agent, did not purport to define "minor" disputes for purposes of preemption. *Conrail*, which was decided forty-four years after *Burley*, noted that "[t]his Court has not articulated an explicit standard for differentiating between major and minor disputes." 491 U.S. at 302, 109 S.Ct. at 2479.

Cir. 1985), *cert. denied*, 480 U.S. 945, 107 S.Ct. 1602, 94 L.Ed.2d 788 (1987).

Third, to hold that every case "founded upon some incident of the employment relation" was a "minor" dispute would undermine the "major"/"minor" distinction. Virtually every dispute between an employer and its employees, including many disputes that are clearly "major," can be said to be "founded upon some incident of the employment relation." For example, it is clear that a dispute arising out of an attempt to secure or change a CBA is a "major" dispute. *Conrail*, 491 U.S. at 302, 109 S.Ct. at 2479; *Burley*, 325 U.S. at 723, 65 S.Ct. at 1289. However, such a dispute could also be characterized as "founded upon some incident of the employment relation." Thus, if such cases were considered "minor," the "major"/"minor" distinction would collapse.

For these reasons, we hold that "minor" disputes, for purposes of RLA preemption, are limited to those that require CBA interpretation.[9] Because Davies' *Burk* action does not require CBA interpretation, it is not a "minor" dispute, and accordingly it is not preempted from judicial resolution.

At least three other circuits have held that a dispute over an employer's disciplinary action that is alleged to result from the employer's wish to interfere with union activity would, if proven, not be "minor." *See Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 789 F.2d 139, 142 (2d Cir. 1986) (per curiam) ("federal judicial intervention [would be] warranted . . . where it is clear that the employer's conduct has 'been motivated by anti-union animus or . . . an attempt to interfere with its employees' choice of their col-

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[9] We are aware of only one district court that has explicitly held that a dispute can be preempted as an "incident of the employment relation" where it does not involve CBA interpretation. *See Majors v. U.S. Air, Inc.*, 525 F.Supp. 853, 857 (D. Md. 1981). We respectfully disagree with *Majors*.

lective bargaining representative.' ") (citation omitted); *Tello v. Soo Line R.R.*, 772 F.2d 458, 462 (8th Cir. 1985) (same); *Brotherhood of R.R. Trainmen v. Central of Ga. Ry.*, 305 F.2d 605, 609 (5th Cir. 1962) (same).

In summary, we hold that Davies' action is not "minor" and therefore does not fall within the exclusive jurisdiction of the arbitration board. Thus we have jurisdiction to hear Davies' action.

II. The Availability of *Burk*

The district court granted JNOV on two grounds which American continues to urge on appeal. First, the district court held that Oklahoma would not provide a *Burk* remedy where alternative remedies are available. Alternatively, the district court held that Oklahoma would not provide a *Burk* remedy for employees who could be discharged only for "just cause." We reject both of these conclusions.

A. *The Availability of Alternative Remedies*

The district court held that Oklahoma law does not provide a remedy for discharge in violation of public policy under *Burk* where the discharged employee has another remedy available. Because Davies has a remedy available under the RLA, the district court held that he cannot maintain a suit under *Burk*.

Recently, the Oklahoma Supreme Court laid to rest this question, which had divided federal courts in Oklahoma. In *Tate v. Browning-Ferris*, 833 P.2d 1218 (1992), the Court clearly held that a *Burk* action is available notwithstanding the availability of other remedies. *Id.* at 1223.[10] We therefore hold under *Tate* that Davies can

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[10] *Tate* acknowledged that a remedy under *Burk* might be precluded by other remedial legislation where the other remedies are intended to be exclusive. *Id.* at 1220, 1223. This is essentially the doctrine of field preemption. Because neither of the parties

maintain a *Burk* suit notwithstanding the availability of other remedies.

B. *Burk and "For Cause" Employees*

Burk granted a tort remedy as a "public policy exception to the at-will termination rule." 770 P.2d at 28. The district court held that an employee who can be fired only for "just cause" is not terminable "at will," and therefore cannot avail himself of *Burk's* remedy. Because Davies could be terminated only for "just cause," the district court held, he could not sue under *Burk*.

The argument to limit *Burk* to "at will" employees is essentially a variant of the argument, addressed above, that *Burk* is unavailable where a discharged employee has an alternate remedy. Because Davies has a contractual remedy under the "just cause" provision of the CBA, American argues, Oklahoma would not grant him another remedy in the form of a *Burk* suit. Rather, American argues, Oklahoma intended *Burk* as a remedy only for those who would otherwise have no protection against discharge. This argument is belied by *Tate*, in which the Oklahoma Supreme Court sanctioned a *Burk* remedy for an employee who had federal and state statutory remedies. 883 P.2d at 1223.

Burk's concern was not with providing a remedy for employees who otherwise would have none. Had this been *Burk's* concern, the Court presumably would have granted a remedy to any "at will" employee who was terminated in bad faith. However, the court refused to imply such a restriction on discharge. *See* 770 P.2d at 27 (refusing to read implied covenant of good faith into "at will" contract). Rather, *Burk* was concerned that the contractual relation between an employer and employee might not

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raised a field preemption argument, and because such an argument does not affect our jurisdiction over the subject matter of this case, we do not address this exception to *Tate*.

adequately protect " 'society's interest in seeing its public policies carried out.' " 770 P.2d at 28 (quoting *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 52 Ill. Dec. 13, 15, 421 N.E.2d 876, 878 (1981)). This is why the Court limited the remedy to employees discharged in violation of "an established and well-defined public policy." *See* 770 P.2d at 29.

When an employer discharges an employee in violation of such a public policy, society is equally aggrieved whether the employee is "at will" or can be discharged only for "just cause." As explained by *Palmateer*, "parties to a contract may not incorporate in it rights and obligations which are clearly injurious to the public." 52 Ill. Dec. at 15, 421 N.E.2d at 878. Thus, whether the contract purported to provide grounds for the discharge or not, the contract could not provide a ground for discharge which is contrary to clear public policy and it is those discharges that trigger a *Burk* cause of action. Accordingly, we believe that Oklahoma would permit a *Burk* action by an employee who could be fired only for "just cause" under his employment contract.[11]

Our holding is supported by *Vannerson v. Board of Regents of the University of Oklahoma*, 784 P.2d 1053 (Okla. 1989). In *Vannerson*, the Oklahoma Supreme Court applied *Burk* without inquiry into whether the plaintiff was an "at will" employee. The plaintiff in *Vanerson* appears to have had the benefit of a formal grievance procedure which limited the defendant's ability to terminate him. *Id.* at 1054. This is essentially the same type of limitation as that in the contract between

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[11] Admittedly, the Oklahoma Supreme Court has characterized *Burk* as an exception to the employment "at will" rule. *See, e.g., Tate*, 833 P.2d at 1223; *Burk*, 770 P.2d at 28. However, at other places in those opinions, the Oklahoma Supreme Court states the *Burk* rule more broadly. *See, e.g., Tate*, 833 P.2d at 1223; *Burk*, 770 P.2d at 29. Thus, we cannot say that the "at will" language in the opinions of the Oklahoma Supreme Court is dispositive.

Davies and American.[12] Notwithstanding this limitation on termination, *Vannerson* permitted the plaintiff's *Burk* suit. *See id.* at 1056 (remanding for retrial of one *Burk* claim where general verdict was based upon two *Burk* claims, one of which did not state adequate public policy ground).

In summary, given *Tate*'s rejection of the proposition that *Burk* is intended to provide a remedy only for employees who otherwise would have none, the fact that *Burk*'s reasoning applies with equal force to "at will" and "for cause" employees, and *Vannerson*'s application of *Burk* in a situation similar to that at bar, we believe that Oklahoma would not limit *Burk* to "at will" employees. Thus, we hold that the district court erred in concluding that Oklahoma would so limit *Burk*.

Because we hold that both of the grounds supporting the district court's grant of American's motion for JNOV are erroneous, we REVERSE that judgment and REMAND for reinstatement of the jury verdict.

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[12] The contract between Davies and American set out both a standard for discharge, "just cause," and a procedure for ensuring that the standard was satisfied in the event of a discharge. In *Vannerson*, we know only that there was a grievance procedure available in the event of a discharge. Although we do not know what standard the employer in *Vannerson* had to satisfy, the existence of a grievance procedure suggests the existence of some standard that precluded the employer from firing the plaintiff arbitrarily.

We use the phrase "at will" to designate an employment relation with no contractual restrictions on the grounds for termination—i.e., a relation in which the employer can arbitrarily fire the employee. Davies would define "at will" more narrowly. According to Davies, an employment relation is "at will" whenever there is no contractual term specifying a temporal duration of employment (e.g., one year). Under Davies' definition, he might be "at will" notwithstanding the "just cause" limitation in his contract. Because we conclude that the Oklahoma Supreme Court would apply *Burk* to relationships that are "at will" in the sense that we use it, we do not address Davies' suggested definition of "at will."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 89-C-881-P

SCOTT DAVIES,

Plaintiff,

vs.

AMERICAN AIRLINES, INC., a Delaware corporation,

Defendant.

JUDGMENT NOTWITHSTANDING THE VERDICT

Upon Motion of the Defendant, American Airlines, Inc., for Judgment Notwithstanding the Verdict, pursuant to Rule 50(b), Federal Rules of Civil Procedure, this Court hereby grants the Defendant's Motion. IT IS HEREBY ORDERED that judgment be entered for the Defendant, American Airlines, Inc.

IT IS SO ORDERED.

DATED this 28 day of September, 1990.

/s/ Layn R. Phillips
LAYN R. PHILLIPS,
United States District Judge

APPROVED AS TO FORM:

/s/ Joe White
JOE WHITE
Attorney for Plaintiff,
Scott Davies

/s/ Reuben Davis
REUBEN DAVIS
KIMBERLY A. LAMBERT
Attorney for Defendant,
American Airlines, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. CIV-89-C-881-P

SCOTT DAVIES,

Plaintiff,

vs.

AMERICAN AIRLINES, INC.,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

[Filed Sep. 28, 1990]

At issue is American Airlines, Inc.'s ("American") motion for judgment notwithstanding the verdict. For the reasons set forth below, the Court GRANTS defendant's motion.

The Court may grant a judgment notwithstanding the verdict when "the evidence points but one way and is susceptible to no reasonable inferences supporting the party for whom the jury found." *Royal College Shop, Inc., vs. Northern Ins. Co. of N.Y.*, 895 F.2d 670, 677 (10th Cir. 1990). The evidence and inferences must be construed most favorably to the nonmoving party. *Id.* The Supreme Court has essentially equated this standard with the "genuine issue" requirement in the summary judgment context, including the principle that the Court's inquiry must be guided by the subsidiary evidentiary standards that apply to the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 254-55 (1986).

In this action plaintiff alleged he was wrongfully discharged by defendant because of his union organizing activities. Initially he asserted two claims, one under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, and one under *Burk v. K-Mart Corp.*, 770 P.2d 24 (Okla. 1989) (recognizing a new tort cause of action for wrongful discharge in violation of public policy). On April 2, 1990, the judge to whom this case was originally assigned denied American's motion to dismiss and alternative motion for summary judgment. In that Order the Court, indulging all reasonable inferences in favor of plaintiff, concluded plaintiff had successfully stated a claim for violation of plaintiff's substantial rights and also for violation of public policy (citing *Burk*), and further concluded that plaintiff's allegations, if proven, would constitute more than a "minor dispute" under the RLA. At the time this motion was ruled upon by the Court, it was known that plaintiff was a union employee operating under the collective bargaining agreement in question. The case was then transferred to the undersigned on April 20, 1990.

On the eve of trial plaintiff amended his complaint to withdraw his RLA claim, and proceeded to trial solely on the *Burk*-type tort claim. The trial was held September 24 and 25, 1990, with the jury returning a verdict in favor of plaintiff. Presently pending are (1) defendant's motion to dismiss the amended complaint, which the Court took under advisement, (2) defendant's motion for directed verdict at the close of all the evidence, which the Court also took under advisement, and (3) defendant's motion for judgment notwithstanding the verdict.

The Court is now convinced it must grant defendant's motion for judgment notwithstanding the verdict for two reasons.

First, the evidence was undisputed that plaintiff was an employee of defendant American, classified as an Aircraft Mechanic, a classification within the skilled labor

craft at American. It was further undisputed that plaintiff was a member of the Transport Workers' Union of America, AFL-CIO, and his employment was governed by the terms of a collective bargaining agreement.

Under the collective bargaining agreement employees could only be discharged when reasons for the discharge were provided in writing (Article 30) and upon just cause (Article 28), with an elaborate grievance procedure available for any employee who believed he or she was treated unjustly (Article 31). Under such circumstances the Court finds plaintiff was not an "at-will employee." An at-will employee is one whose employment is of indefinite duration and who may be discharged "for good cause, for no cause or even for cause morally wrong." *Burk*, 770 P.2d at 25. Since plaintiff could only be discharged for "just cause," he was not an at-will employee. Since he was not an at-will employee, he does not fall within the provisions of *Burk*. *Burk* created a new tort cause of action for the discharge of an at-will employee in violation of public policy. Specifically, *Burk* "adopt[ed] . . . the public policy *exception to the at-will termination rule*" and created a new tort cause of action for the "termination of an *at-will employee* in contravention of a clear mandate of public policy." *Id.* at 28 (emphasis added). Since plaintiff was not an at-will employee, he is not entitled to bring a *Burk*-type tort cause of action.

Second, the Court concludes that even if plaintiff did fall within the provisions of *Burk*, his public policy-based tort cause of action would be preempted by the existence of a remedy under the Railway Labor Act, 45 U.S.C. § 151 *et. seq.* The Court is aware of a split of authority on this issue among the federal judges sitting in Oklahoma. *Compare Paynter v. American Legion Children's Home Corp.*, Nos. CIV-88-166-W and CIV-88-2053-W (W.D. Okla. Oct. 11, 1989) and *Webster v. Avis Rent-A-Car Systems, Inc.*, No. 87-C-718-B (N.D. Okla. May 4,

1989) (holding no preemption exists) *with Zimmer v. Rockwell Int'l Corp.*, No. 89-C-476-C (N.D. Okla. Apr. 2, 1990); *Vogle v. Dillard Department Stores, Inc.*, CIV-89-1262-R (W.D. Okla. June 1, 1990); *Weiss v. Diversey Wyandotte Corp.*, No. CIV-89-1991-A (W.D. Okla. Dec. 21, 1989); *Wilson v. O.I. Brockway Glass, Inc.*, No. 89-91-C (E.D. Okla. Nov. 9, 1989); and *Patterson v. Hudson Farms, Inc.*, No. 88-C-273-E (N.D. Okla. Mar. 1, 1989) (holding preemption exists). This issue has also been certified to the Oklahoma Supreme Court for determination. *Tate v. Browning Ferris, Inc.*, No. CIV-89-806-T (W.D. Okla. Jan. 24, 1990).

The decisions cited above contain a thorough analysis of the preemption issue and this Court finds it unnecessary to repeat the discussion here. The Court, however, joins in those decisions in now finding that any public policy-based tort cause of action which plaintiff may have been entitled to raise under *Burk* is preempted by the existence of a remedy under the RLA.

Accordingly, defendant American's motion for judgment notwithstanding the verdict is GRANTED, and JUDGMENT is hereby entered in favor of defendant American Airlines, Inc. for the reasons set forth in this Order and for the reasons announced on the record on September 28, 1990, which reasons are incorporated by reference.

IT IS SO ORDERED this 28th day of September, 1990.

/s/ Layn R. Phillips
LAYN R. PHILLIPS
United States District Judge

APPENDIX C

TULSA AREA BOARD OF ADJUSTMENT

Case No. M-427-89 TULE

AMERICAN AIRLINES, INC.

and

TRANSPORT WORKERS UNION, LOCAL 514

SCOTT DAVIES: TERMINATION

WILLIAM EATON
Neutral Referee

KENNETH WILLIS
Company Member

JIM COOK
Union Member

APPEARANCES:

For the Union

MARION FINLEY
Vice President
Transport Workers Union, Local 514
Air Transport Division, AFL-CIO
11929 East Pine Street
Tulsa, Oklahoma 74116

For the Company

MICHAEL F. COSTELLO
Manager, Employee Relations
American Airlines, Inc.
Maintenance & Engineering Center
Tulsa, Oklahoma 74151

ISSUE AND EVIDENCE

The question before the Board of Adjustment is whether Grievant Scott Davies was discharged for just cause under the Agreement between the parties, and if not what the remedy shall be. Hearing was held in Tulsa Oklahoma on January 16 1990. At that time the Grievant was fully and fairly represented by the Union, was present throughout the hearing, and testified in his own behalf. Following presentation of evidence by both parties, the matter was submitted to the Board of Adjustment for final and binding determination upon oral argument at the close of the hearing, and was decided by the Board meeting in Executive Session directly thereafter, pending preparation of the Referee's Opinion.

The Grievant, an Aircraft Maintenance Mechanic assigned to the Tulsa Maintenance and Engineering Base, is a member of the Organizing Committee of the Airline Mechanics Fraternal Association (AMFA), which during the period in question was seeking to obtain a representation election for Mechanics and other crafts now represented by TWU at the Tulsa base. In this capacity he placed an ad in the *Tulsa World* newspaper which ultimately led to the Company's issuing him a Career Decision Day Advisory, followed by a Final Advisory. The Career Decision Day Advisory, the accompanying Letter of Commitment, the ad in question, and the Final Advisory reads as follows.

October 19, 1989

TO:	Scott Davies	88900	Mechanic
	Name	Emp #	Classification

RE: "Career Decision Day" Advisory

On Friday, October 13, 1989, the attached advertisement was published in the Tulsa World newspaper. An investigation of this incident revealed that you placed this notice on October 9, 1989. Moreover, you admitted that you were solely responsible for the format of this notice, and that you did not request permission from anyone at AMR Corporation to use the name "American Airlines" as the heading for this notice.

Your actions as stated above fall far short of those which can reasonably be expected of an American Airlines employee, and are also in violation of American Airlines Rules and Regulations #21 and #24, which state:

Rule #21—"Do not make false or slanderous statements about the Company, its employees or patrons."

Rule #24—"Consider the welfare of the Company and your fellow employees. Perform no act which is detrimental to either."

In view of the extremely serious nature of the above infraction, you will be given a "Career Decision Day Off", with pay, to review and select one of the following options:

Option 1: Sign a "Letter of Commitment" agreeing to comply with all Company Rules and Regulations, inclusive of both satisfactory work performance and personal conduct.

Option 2: Sign an agreement *not* to exercise your grievance rights and in turn, the Company

will accept your resignation with the following transition benefits:

(A) Health Insurance benefits will remain in effect for 90 days after date of resignation with premium paid by the Company.

(B) One-way return home pass will be available for you and eligible family members.

(C) Outplacement counseling by appropriate Personnel Office.

(D) Payment of $500. by the Company of documented employment agency fee for other employment.

Option 3: Termination of employment with the option to grieve.

I urge you to carefully consider each option and be prepared to advise me of your selection upon your return back from your "Career Decision Day Off". Additionally, if you choose Option 1, you must sign and date the attached "Letter of Commitment".

/s/ [Illegible]
Supervisor
200/7885
Station/Branch

cc: Personnel File
Employee Relations

✓ Personally handed to employee

— Mailed to employee

10-19-89
Date

/s/ [Illegible]
By:

advisory/28

October 20, 1989

TO:	Scott Davies	88900	Mechanic
	Name	Emp #	Classification

RE: Final Advisory

On October 20, 1989, you returned from a "Career Decision Day" granted to you under the procedures of the Peak Performance Through Commitment Program.

You have failed to select any option indicated on your "Career Decision Day" Advisory, and by default have therefore selected Option #3.

You are hereby terminated from employment with American Airlines effective October 20, 1989.

All Company property, including (but not limited to) AA identification cards/badges of any kind and keys assigned to you are to be returned to me and are not to be used for any purpose after the date of this letter. Any pay due you will be paid upon surrender of all Company property. Please contact me about any questions or other matters regarding benefits, credit union, etc., which you may have.

/s/ [Illegible]
Supervisor

✓ Personally handed to employee

— Mailed to employee

10-20-83 /s/ [Illegible]
Date By:

cc: Personnel File
Employee Relations

advisory/33

LETTER OF COMMITMENT

In consideration for my continued employment with American Airlines, I agree that I will immediately correct my performance problem by complying with all Company Rules and Regulations, as well as maintaining a satisfactory work performance record in all respects. Moreover, I understand that if I do not correct my performance problem, I will be discharged without further warning.

I agree that this Letter of Commitment shall be final and binding and that my decision is irrevocable and shall not be the basis of any grievance or claim of any kind against the Company.

I HAVE CAREFULLY READ AND UNDERSTAND ALL OF THE ABOVE.

Employee's Signature Date

TULSA WORLD ADVERTISEMENT

AMERICAN AIRLINES

Attention All Skilled Labor: Mechanics, Machinists, Fuelers, A/C Cleaners (Exterior & Parts), Blast Operator, Auto Mechanics, Carpenter & Building Maintenance.

A FORMAL DEBATE BETWEEN

—Mr. Ed Wilson, Local 514 of T.W.U.

Mr. O.V. Delle Femine of A.M.F.A.

MEDIATOR:—Oaland Jeffers of Channel 23 KOKL

PLACE:—Mingo Elementary School Gymnasium

TIME: Saturday, October 14th at 12:00 P.M.

Spouses are formally invited to attend

Company Neutrality Policy

Company Labor Relations Representative Dennis Quish testified that the ad as run in the *Tulsa World* violated the Company's policy of strict neutrality in regard to inter-union or intra-union disputes. The ad, in the opinion of the Company, given the bold face AMERICAN AIRLINES heading, implied that the debate referred to between AMFA and TWU was being sponsored by the Company. Thus, to the Company, the ad was false, in violation of Rule 21, in leaving the impression that the Company was involved, when it was not. The welfare of the Company was damaged by this impression, in violation of Rule 24, in the view of the Company.

The Company agreed that there was no evidence that any particular passenger had elected not to fly American Airlines because of the ad, stating that it had made no effort to search out or locate any such person for the reason that it chose not to take any action to publicize such a matter as this.

American Airline Regulation 15-3 B provides that public statements by officers or employees "identified with AA must have advance clearance from the Corporate Communications Department," that all such statements must be in "good taste," and that "negative statements or implications that might reflect unfavorably on our customers, our employees, our competitors, the community we serve, or the government officials with which we deal" must be avoided.

In regard to AMFA efforts to obtain a representation election, the Company posted a bulletin dated July 25 1989 pointing out that American Airlines had "consistently prohibited union politicking, electioneering, etc. on Company premises," and that such a policy "is necessary because the Company wishes to remain neutral regarding any inter/intra union activities." The bulletin pointed out that the "current activity concerning AMFA is no exception" adding, "it is extremely important that everyone in management maintain a neutral position."

The Grievant testified that it was he who placed the *Tulsa World* ad and that he paid for it with a check from the Organizing Committee. The intent, he stated, was to announce the debate, to arouse interest, and to obtain signatures for the yellow representation cards required in order to obtain an election. He insisted, however, that the phrase "AMERICAN AIRLINES" was meant to refer to all airlines in America, not simply to American Airlines, Inc., or to the Tulsa base. He insisted that he had no intent to harm the Company in placing the ad.

A notice advertising the same debate was placed in the *Owasso Reporter* on October 12 1989. That ad was headed "DEBATE," was attributed to the AMFA-TUL Organizing Committee, and in the text of the ad invited all "American Airlines Skilled Labor" to the debate. In the opinion of Labor Relations representative Quish, the Owasso ad was not objectionable for the reason that it was attributed to the AMFA Organizing Committee, and was simply addressed to American Airlines employees in the text of the material, thus creating no impression that it was a Company-sponsored event. A similar ad had been placed in the *Owasso Reporter* in July.

When the Grievant was asked whether the placement of ads in the *Owasso Reporter* did not indicate that the material was aimed specifically at American Airlines employees, not at employees of all airlines in America, his reply was, "It could mean either."

Mechanic Alan Jackson, who identified himself as another member of the AMFA Organizing Committee, testified that no one had advised the Committee that the use of the American Airlines heading was contrary to Company policy, admitting on cross-examination that no permission had been given either. He testified that the Committee had discussed using the AMERICAN AIRLINES heading in order to notify American Airlines people "in our class and craft," and that there had been no intent to harm American Airlines. He reiterated the view of the Grievant that the heading was intended to be addressed to employees of all airlines in America.

29(f) Hearings

Following the appearance of the contested ad, a 29(f) hearing was held by Labor Relations Manager, Mike Costello on October 16 1989, including Company representatives, the Grievant, and a Union representative. At that meeting, according to Labor Relations representative Quish, who attended, Manager Costello explained at some length to the Grievant the way the Company perceives the ad, and its belief that such an ad detracts from the image which the Company wishes to present to the public, and upon which it spends many millions of dollars a year in public relations and publicity. Quish stated that the Grievant was entirely cooperative at this meeting, that he took full responsibility for placing the ad, but that he did refuse to identify others who might have also been responsible, explaining that he refused to identify others for the reason that he did not want "to drag anyone else" into the 29(f) meeting.

The Grievant agreed that the AMERICAN AIRLINES heading had been used "to draw attention" to the ad, and that even if one passenger were induced not to fly American as a result that would be an adverse effect on the Company. He admitted that no permission had been sought to use the heading as placed in the ad, saying that

he knew the Company's Rules and Regulations, including the Company's position on neutrality in inter-union disputes. He said that he had no intent to involve the Company, stating that if he had known the Company would be so upset at the ad he would have done it differently. Nevertheless, he asserted that he had done nothing wrong. Testifying before the Board of Adjustment, the Grievant maintained that he had not been aware of the Company's policy concerning inter-union disputes prior to the 29(f) meeting.

At the close of the 29(f) meeting the Grievant was held out of service with pay for two days pending further Company investigation. In the interim, according to Quish, it was determined that if the Grievant conceded that he had been in error in placing the ad, and if he was willing to correct his behavior in the future, a Second Step Advisory would be the extent of the penalty assessed. The 29(f) hearing was reconvened on October 18, this time conducted by Labor Relations Representative Quish. According to Quish, the demeanor of the Grievant was entirely changed from that of the preceding hearing, he was "not the same individual," and he appeared to have been "coached" in his answers.

It was at this hearing that the Grievant first contended that the AMERICAN AIRLINES heading was not meant to indicate American Airlines, Inc., but all the airlines in America. Asked whether he would agree not to use American Airlines' name again in a smilar manner, the Grievant would only state that he would not use the same "format" again. At the arbitration hearing, when asked whether he had agreed not to the use the American Airlines name in such a manner again, the Grievant replied. "In not so few words." He explained that the reference to American Airlines employees in the Owasso ad had not been objectionable, and that this is what he had in mind in saying that he would not use the same "format" again.

Quish testified that he repeatedly attempted to get the Grievant simply to agree not to use American Airlines in future ads, that the Grievant would again reply with the "format" answer, that he appeared to be "playing word games," and that the meeting was adjourned on that basis. The Grievant was suspended for an additional day with pay so that the Company could consider the matter further.

The 29(f) hearing was convened for a third time on the following day, October 19, again conducted by Manager Costello. Costello explained in great detail what the Company's position was in regard to the apparent attribution of the ad to the Company, and described the Company's Peak Performance Through Commitment (PPC) policy as well. The Grievant continued to insist that he had done nothing wrong, and would say nothing more than that he would not use the same "format" again. In addition, he cited the Railway Labor Act, and for the first time contended that the Company was interfering with AMFA organizing activities.

The Grievant agrees that the PPC program was explained to him, at least in a general way, and that the Career Decision Day options were also outlined including the fact that if he failed to elect one of the three options he would be terminated.

The Company at this point elected not to issue a Second Step Advisory, but to move directly to the Career Decision Day Advisory for the reason that the Grievant would not concede that he had been wrong in placing the ad as he did, and that he would not commit himself to desist from similar action in the future.

Following his Career Decision Day the final session of the 29(f) hearing was convened on October 20 1989. At that time the Grievant refused to elect any of the three options, the meeting was adjourned briefly, the Final

Advisory terminating him was prepared, and it was then presented to him.

The Grievant maintained before the Board of Adjustment that he refused to sign any of the options on the Career Decision Day letter for the reason that that would constitute an admission of guilt, and he was not guilty of any wrongdoing. He also stated his fear that signing an option would sign away his contractual right to grieve, that after that "anyone could say anything," and that he would be discharged with no rights left. He agreed, however, that no one had ever told him that if he signed his Career Decision Day commitment he could be fired without the right to grieve.

Company Policy

The Company's PPC policy, as explained to the Grievant, is a flexible policy designed to resolve employee violations or work deficiencies rather than necessarily to assess discipline upon such occurrences. Some infractions, such as theft, justify termination upon a first offense, despite an employee's prior record.

The first application of the PPC policy is normally by the First Line Supervisor. This may result in nothing more than a discussion, without the involvement of Labor Relations, and often, according to Company testimony, in a resolution of the problem at that level. Even if a more formal meeting is required, and that meeting appears to have achieved the object of correcting the deficiency, the matter may be dropped at that point. As Labor Relations Representative Quish pointed out, terminating an employee is a loss to the Company, particularly as in the case of the Grievant, where the employee is a licensed Mechanic, which is a skill not easy to locate on the job market.

The Company entered into evidence two examples of what it considers would be typical applications of the PPC policy, even though these particular examples oc-

curred either before the PPC policy was formally adopted or at approximately the same time. These incidents concerned the "Atlanta Ten" and the "Dallas Twenty."

In the Atlanta cases arising in 1983, the President and other members of TWU Local 513 had appeared with "sandwich type" signs at Heartsfield International Airport in Atlanta stating that American Airlines had "no licensed, qualified Mechanics making pre-departure inspections." The ten had been discharged as a result, but were reinstated without back pay in a general settlement of the dispute between the Union and the Company. As a part of the settlement, the local 513 President stated: "I have come to realize that our actions were unwarranted and regret the problems they have caused."

The Dallas case involved twenty Fight Attendants passing out handbills at DFW which also questioned the commitment of the Company to safety, and to its fairness in dealing with employees. These employees were also reinstated after lengthy negotiations, and upon certain conditions not relevant to the present dispute.

In presenting these cases, it was the Company's stated intention to indicate its flexibility in handling employee disputes, as incorporated into the Peak Performance Through Commitment Policy, which it contends was applied in the case of the present Grievant.

ARGUMENTS

Company

After hearing the Grievant's testimony, the Board of Adjustment may share the frustration of the Company in its inability to get information on the event. Neither Union witness was cooperative, but appeared to be coached and had chosen their words very carefully in testifying before the Board. This is contrary to the Grievant's open and cooperative attitude at the first 29(f) hearing.

The Grievant offers the ridiculous notion that, in using the AMERICAN AIRLINES heading, he did not mean his company, but meant to address the ad to all airlines in America. It is obvious that he meant to address the ad to American Airlines employees in Tulsa, and to no one else.

He admits that he knew the Company wanted nothing to do with the intra-union dispute between AMFA and TWU. He knew that before he placed the ad, and he placed it anyway. In contrast to the *Owasso Reporter* ad, which simply addressed American Airlines employees in the text, and which was clearly attributed to the AMFA Organizing Committee, the ad in dispute, while giving the appearance of being sponsored by American Airlines, contained no attribution indicating that it had been placed by AMFA.

The Company spends millions of dollars to maintain its number one status in size, quality, and innovation, and to set it apart from other airlines in the industry. In the Tulsa area the ad as placed by the Grievant suggests labor strife, and may well cause some potential patrons to use alternate carriers. The Company did not go out of its way to find out if this was so, because it chooses not to air its "dirty laundry" in that fashion. Prior Boards of Adjustment have recognized that the Company does not have any obligation to seek out members of the public in such circumstances.

There are several layers of potential harm in what the Grievant did. First, passengers may not choose to fly American Airlines. Secondly, members of other unions, particularly TWU members, may believe that the Company is sponsoring the ad, and thereby soliciting a rival union on the property. Finally, employees on the floor, seeing the ad in a newspaper of some 200,000 circulation in the Tulsa area, may be led to believe that the Company is attempting to incite union rivalries.

The Company was unable to locate any prior System Board cases directly on point. The "Atlanta Ten" and the "Dallas Twenty" are the closest approximations, and those cases indicate that, when employees who have violated Company rules recognize that they have done so, and commit themselves to correct their behavior, the Company's policy is flexible, and the Company is willing to recognize when the problem has been resolved.

No admission of guilt, and no resolution, was reached in the present dispute, even though the PPC program was explained to the Grievant, and he was presented with the clear Career Decision Day Advisory, which was carefully explained to him.

Where such actions have been taken against the Company's interest, and contrary to known Company policy, a stringent penalty must apply. To allow Company employees to go out and use the Company name as they see fit would lead to disastrous consequences.

The Grievant having failed to recognize his wrongdoing, or to commit to correct his behavior, discharge is the only alternative open to the Company. For these reasons it is respectfully requested that the Company's action be sustained and the grievance denied in its entirety.

Union

The Atlanta and Dallas cases cited by the Company are different from today's case for the reason that in those cases the employees involved had an intent to damage the Company. The present Grievant had no such intent, and there is no evidence that the Company was damaged in any way.

The Grievant is an employee of some five and one-half years seniority with an excellent record, and is a good worker. He was simply working with a group trying to organize the mechanics of American Airlines, and had no

intent to harm the Company in placing the contested ad in the *Tulsa World*. That was not the first such ad to appear in a local newspaper, and the Company has not objected to other ads of a similar nature.

The Company admits that at the time of contract negotiations both Union representatives and Union members give statements to the media, and that this is a common practice. The case here is unique, and there are no prior System Board decisions pro or con regarding such incident.

The ad in the *Tulsa World* does not say that American Airlines supports AMFA, while the Union witnesses maintain that they were simply addressing the ad to all mechanics in the area, no matter who they worked for.

Elkouri and Elkouri, *How Arbitration Works*, in their 4th Edition (p 657), point out that discipline for conduct away from the plant may not normally be assessed unless that conduct is such as to harm the Company, its reputation, or its product. No such harm has been demonstrated in the present dispute. Moreover, the Employer has the burden of proving just cause in a discharge case, a burden which has not been met in this dispute.

The message here is that once a Career Decision Day letter has been issued, the employee has no choice but to find other employment for the reason that if he signs the letter he can thereafter be fired without any chance in arbitration.

Unlike the case of the "Atlanta Ten" or the "Dallas Twenty" where leaflets or other information alleged Company safety problems, and where the attempt clearly was to harm the Company, there is no such evidence in the present dispute.

For these reasons the Union asks that the Grievant be put back to work with no loss of benefits, and be made whole in all respects.

ANALYSIS

The first consideration is to examine the nature of the ad itself. Two words, the bold faced captioned words "AMERICAN AIRLINES," clearly dominate the message of the ad. The debate announced is between the President of TWU local 514 and a representative of AMFA. Local 514 represents Mechanics and other employees at the American Airlines Maintenance and Engineering base in Tulsa, employees AMFA is attempting to organize. Related ads appeared in the *Owasso Reporter* specifically directed, in their text, to "All American Airlines Skilled Labor." Owasso is a locality adjacent to Tulsa in which a great many of the thousands of employees at American Airlines reside.

The Grievant contends that he meant no harm to the Company in using the AMERICAN AIRLINES heading on his ad. Perhaps not initially. However, after the Company patiently and repeatedly explained to him its view that great harm can result through such unauthorized identification of the Company with intra-union disputes, the Grievant reverted to the explanation that the words AMERICAN AIRLINES did not refer to the present Company, but to all airlines in America. The absurdity of this explanation in the present context is such as to require no further comment.

The Grievant maintained throughout four sessions of the 29(f) meeting, and in his testimony before the Board of Adjustment, that he has done no wrong. Presented with the Career Decision Day letter, he refused to elect any of the options, or to commit himself to desist from unauthorized use of the Company name, as he had refused to do in the 29(f) sessions. While there is a patina of legitimacy of the Grievant's stated concern that signing the Letter of Commitment as written might deprive him of contractual grievance rights, in the entirety of this dispute the Board agrees with the Company's conclusion that the Grievant is "playing word games," and not making a

good faith attempt to meet the Company's objections, or to correct his behavior.

The parties have presented a number of prior arbitration decisions, both from American Airlines Boards of Adjustment and from industry generally, to assist in evaluating this dispute. Some of these cases simply state truisms about which there is no dispute, such as the requirement that the Company bear the burden of proving just cause in discharge cases by a preponderance of the evidence, or that a well reasoned decision by management, taken in good faith, as to what the penalty for an infraction should be ought not, in most circumstances, to be disturbed.

The Union offers Case No. M-577-75 TULE to illustrate a circumstance in which the Company had failed to show that the grievant had been definitely put on notice that the infraction cited (consumption of a meal from a terminated flight) would be considered theft and a ground for discharge. That case might serve the present Grievant's cause had he been initially presented with the Final Advisory without further investigation or clarification of the Company's policy herein. However, even after the Company's policy was carefully and repeatedly explained to him, this Grievant still maintained that he had done nothing wrong, and refused to commit himself to any correction of his behavior.

The Union also cites Case No. M-301-77 PHX by the present Chairman, indicating that where there is no showing of wrongful intent a penalty of discharge may be reversed. But again, in the present dispute it is not the Grievant's original intent, whatever that may have been, which is controlling. Rather, it is his persistent refusal to recognize an infraction, or to correct his behavior, even after his error had been patiently explained to him.

The Company offers Case No. SS-201-75 BOS, in which a Flight Attendant's discharge for selling t-shirts aboard

an aircraft bearing inscriptions damaging to the Company's image was upheld. Similarly, in Case No. M-542-76 TULE, a ten day suspension against a Building Cleaner for having made adverse comments against the Company while traveling as a non-revenue from DFW to TULE was upheld.

Case No. 167-87 ORD dealt with the application of the PPC program. In that case Referee Mark L. Kahn endorsed the Company's option to skip the first two Advisories, and to move directly to a Career Decision Advisory, when circumstances warrant. He pointed out, at the same time, that employees are entitled to grieve the merits of any application of the PPC, "including a discharge subsequent to the signing of a Letter of Commitment." In that case the grievant had elected termination with the option to grieve.

The case offering an opinion which is most relevant to the facts of the present dispute is No. SS-36-66 DAL, in which a Flight Attendant had allegedly offered passengers on an aircraft in flight "dinner or Alka Seltzer," explained that "it was the crew's first trip," and that as a result "they were practicing." Referee Peter M. Kelliher found that the Grievant did not correctly state the facts when asked to do so after being advised of these charges, adding that, "It may well be that the Company would not have instituted discharge proceedings if she had made a full and honest statement." He found that the statements made "did reflect upon the Company's service," and that in the circumstances discharge was warranted. Similar considerations govern the present dispute.

The Company herein considered the actions of the Grievant over a period of an entire week, including four 29(f) sessions with him. He was clearly apprised of the severe consequences which can result from unauthorized use of the Company name, particularly in regard to intra-union disputes, and yet he remained recalcitrant in admitting

error or in committing to desist from such action in the future, and in offering a patently absurd excuse for what he had done.

In such circumstances there is no basis upon which the Board of Adjustment could justify reversal of the Company's decision to discharge.

/s/ William Eaton
WILLIAM EATON
Neutral Referee

January 24, 1990

DECISION

Grievant Scott Davies was discharged for just cause.

/s/ Kenneth Willis
KENNETH WILLIS
Company Member

/s/ Jim Cook Dissent
JIM COOK
Union Member

/s/ William Eaton
WILLIAM EATON
Neutral Referee

January 24, 1990

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-5231

(Dist. Ct. No. 89-C-881-P)

SCOTT DAVIES,
Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC., a Delaware corporation,
Defendant-Appellee.

ORDER

Entered September 8, 1992

Before McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges, and ANDERSON *, District Judge.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who

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* The Honorable Aldon J. Anderson, Senior District Judge of the United States District Court for the District of Utah, sitting by designation.

are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-5231
(Dist. Ct. No. 89-C-881-P)

SCOTT DAVIES,
Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC., a Delaware corporation,
Defendant-Appellee.

ORDER

Filed October 1, 1992

Before ANDERSON and EBEL, Circuit Judges and ANDERSON *, District Judge.

This matter comes on for consideration of appellee's motion for stay of mandate.

Upon consideration whereof, the motion is granted. The mandate is stayed pending final disposition by the Supreme Court of the United States.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

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* The Honorable Aldon J. Anderson, Senior District Judge of the United States District Court for the District of Utah, sitting by designation.

APPENDIX F

RELEVANT PROVISIONS OF AGREEMENT BETWEEN AMERICAN AIRLINES AND TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO COVERING AIRLINES MECHANIC, PLANT MAINTENANCE AND GROUND SERVICE EMPLOYEES OF AMERICAN AIRLINES, INC., EFFECTIVE MAY 5, 1989

ARTICLE 28—NO DISCRIMINATION, AND RECOGNITION OF RIGHTS AND COMPLIANCE

(a) The Company and the Union agree to make it a matter of record in this Agreement that in accordance with the established policy of the Company and the Union, the provisions of this Agreement will apply equally to all employees hereunder regardless of sex, color, race, creed or national origin.

(b) The Union recognizes that the Company shall have sole jurisdiction of the management and operation of its business, the direction of its working force, the right to maintain discipline and efficiency in its hangars, stations, shops or other places of employment, and the right of the Company to hire, discipline and discharge employees for just cause, subject to the provisions of this Agreement. It is agreed that the rights enumerated above shall not be deemed to exclude other preexisting rights of management not enumerated which do not conflict with other provisions of this Agreement.

(c) Any decisions or agreements relating to the interpretation or application of this Agreement made jointly by the Company and the Union shall be binding on every individual employee claiming or entitled to the benefits of this Agreement.

(d) All letters of discipline (warning or suspension) will be removed after a period of two (2) years from date of issuance.

ARTICLE 31—GRIEVANCE PROCEDURE

(a) An employee who believes that he has been unjustly dealt with or that any provision of this Agreement has not been properly applied or interpreted, or against whom the Company has preferred charges, in writing, may present his grievance in person or through his representatives, within seven (7) calendar days to his immediate supervisor, who shall evaluate the grievance or complaint and render his decision as soon as possible, but not later than seven (7) calendar days following receipt of said grievance.

(b) If the decision of the immediate supervisor is not satisfactory to the employee whose grievance is being considered, it may be appealed within ten (10) calendar days to the Chief Operating Officer, designated by the Company, who shall fully investigate all of the facts upon which said grievance is based and shall render a decision thereon as soon as possible, but not later than ten (10) calendar days following his receipt of the appeal.

(c) If the decision of the designated Chief Operating Officer is not satisfactory to the employee, the grievance and the decision thereon may be appealed to the System General Board of Adjustment, as provided for in Article 32 of this Agreement, provided, however, said appeal must be submitted within twenty (20) calendar days of receipt of the decision rendered by the designated Chief Operating Officer.

(d) All grievances handled under the procedure provided above shall be in writing and shall be signed by the employee whose grievance is being handled, and all decisions on said grievance shall be in writing. In cases in which the aggrieved employee authorizes his representative to handle his grievance for him, the submission of the grievance or appeal shall be accompanied by a statement signed by the employee fully authorizing his

representative to act for him in the disposition of said grievance. Two (2) copies of all grievance answers will be submitted to the Local Union.

(e) An employee who has a grievance may present said grievance to his immediate supervisor during regular work hours and an Accredited Representative of the Union may investigate, discuss and present a grievance of an employee or employees during regular work hours without suffering loss of pay for time so spent.

(f) If any decision made by the Company under the provisions of this Article is not appealed by the employee affected within the time limit prescribed herein for such appeals, the decision of the Company shall become final and binding.

(g) If, as a result of a decision in any of the steps of the grievance procedure as provided herein, an employee is exonerated, he shall, if he has been held out of service, be reinstated without loss of seniority and shall be paid at regular rates for time lost.

(h) When it is mutually agreed that a stenographic report is to be taken of any hearing, in whole or in part, the cost will be borne equally by both parties to the dispute. When it is not mutually agreed that a stenographic report of the proceedings is to be taken, any written record available of such hearing made by either of the parties to the dispute shall be furnished to the other party to the dispute upon request, provided that the cost of such written record so requested shall be borne equally by both parties to the dispute.

(i) Upon the request of an Accredited Union Representative, the Company will inform the Union of its decision on any grievance regarding which a formal hearing or investigation has been held at which the aggrieved employee was not represented by his Accredited Union Representative.

ARTICLE 32—BOARDS OF ADJUSTMENT

I. *Boards of Adjustment*

(a) Pursuant to the provisions of the Railway Labor Act, as amended, there are hereby established (i) a System General Board of Adjustment, (ii) two System Divisional Boards of Adjustment, and (iii) six Area Boards of Adjustment.

(b) The Boards shall have jurisdiction only over disputes between the Company and the Union or any employee or employees governed by this Agreement growing out of grievances involving interpretation or application of this Agreement. The Boards shall have no jurisdiction, whatsoever, over proposals or disputes relating to general changes in hours of work, rates of pay, rules or working conditions. Proposals relating to general changes in hours of work, rates of pay, rules or working conditions shall be handled in the manner provided for in Article 46 of this Agreement.

II. *System General Board of Adjustment*

(a) The System General Board of Adjustment shall be composed of a Company member, a Union member and a neutral referee, the latter to serve for an indefinite term; however, either party may cause the services of the neutral referee to be terminated by giving written notice to the other party and to the neutral referee.

(b) If a neutral vacancy occurs and the Company and the Union cannot agree on a successor within fifteen (15) days, the American Arbitration Association will be requested to select a neutral in the manner described in Rule 12 of its Voluntary Labor Arbitration Rules, as in effect on February 1, 1965.

(c) The Company member and the Union member of the General Board shall serve as Chairman and Vice-Chairman, respectively, and shall exchange offices at the end of each calendar year.

(d) The General Board shall hear and determine all disputes properly before it which are not within the jurisdiction of the Divisional or Area Boards pursuant to paragraphs III. and IV. of this Article.

III. *System Divisional Boards of Adjustment*

(a) Each Divisional Board shall be composed of a Company member, a Union member and a neutral referee.

If the position of neutral referee of a Divisional Board becomes vacant and the Company and the Union cannot agree on a successor within fifteen (15) days, one shall be selected in the same manner as the filling of a vacancy under paragraph II. (b) of this Article.

(b) The jurisdiction of the Divisional Boards shall be as follows:

(1) Divisional Board I shall have jurisdiction over overtime and other rate-of-pay grievance cases.

(2) Divisional Board II shall have jurisdiction over scope, work assignment and seniority grievance cases.

IV. *Area Boards of Adjustment, Discipline and Dismissal Cases*

(a) Area Boards of Adjustment shall be maintained in New York, Chicago, Los Angeles, Tulsa, San Francisco and Dallas/Ft. Worth. The jurisdiction of each such Board shall be limited to discipline and dismissal cases arising in the area in question.

(b) Each Area Board shall be composed of one member appointed by the Company, one member appointed by the Union, and a neutral referee as Chairman. However, by mutual agreement of the parties, an additional neutral referee may be selected to hear Area Board cases scheduled in cities other than those designated in the above paragraph. Members of the Area Boards appointed by the parties shall serve at the pleasure of the party making the

appointment, except that a Board member shall continue to serve until his successor has been appointed. Each neutral referee shall serve for an indefinite term; either party may cause the services of the neutral referee to be terminated (except as to cases already submitted to him) by giving written notice to the other party and to the neutral referee.

(c) If the position of neutral referee of an Area Board becomes vacant and the Company and Union cannot agree on a successor within fifteen (15) days, one shall be selected in the same manner as the filling of a vacancy under paragraph II.(b) of this Article.

(d) Each Area Board shall hold hearings at a location in its city, off Company premises, to be determined by the Area Board, except that another city may be designated by mutual agreement of the Union Local President and the Employee Relations representative designated by the Company.

V. *Procedures Generally Applicable to the Boards*

(a) The System General Board and the two System Divisional Boards shall meet in the city where the general offices of the Company are maintained (unless a different place of meeting is agreed upon by the parties to the dispute).

(b) The Company and Union shall at all times have their respective Board members available at the convenience of the various neutral referees, and alternate members shall be provided by the Company or Union, as the case may be, whenever its regular Board member is not available. If an alternative member is not provided within a reasonable period of time, the neutral referee shall proceed with the hearing and decision of the matters before the Board without participation by the absent member, and the decision of the neutral referee shall constitute the decision of the Board.

(c) The Company or the Union may terminate the services of a neutral referee at any time, except as to cases already submitted to him, by giving written notice to the other party and to the neutral referee.

(d) All disputes referable to the Boards shall be sent to the General Board and, based on the primary issue in dispute, the Chairman and Vice Chairman shall jointly refer the matter to the appropriate Board (General, Divisional or Area Board) for hearing and decision. Any disagreement as to which Board is the appropriate Board shall be determined by the General Board.

(e) As to disputes before the General Board and Divisional Boards, the Chairman and Vice Chairman of the General Board shall set the hearing dates (providing notice thereof to the parties). Each party will designate a representative for each Area Board who jointly shall be responsible for the scheduling of cases referred to the Area Board they represent. Each party will supply to the other, and keep current, a list of its designated representatives for the Area Boards. The designated Company and Union representatives of each Area Board shall set the hearing dates for such Board (providing notice thereof to the parties and to the Administrator—Boards of Adjustment). All cases shall be set for hearing promptly in order to keep the number of cases docketed to a minimum. Unless the parties agree otherwise, the case with the lowest docket number pending before a Board will be scheduled first; other cases pending before that Board arising from the same station as the case with the lowest docket number will be scheduled for hearing on that meeting of the Board. In the event there are no such other cases, the case with the next lowest docket number will be scheduled, and the aforementioned scheduling procedure will be followed until there are a sufficient number of cases scheduled to insure full days of hearing. Cases so scheduled but not heard for lack of time will be rescheduled in accordance with the above scheduling procedure.

The parties recognize that as the scheduling of cases takes place well in advance of dates of hearing, those cases rescheduled due to lack of hearing time will be out of numerical sequence with those already scheduled.

If the designated Company representative and the designated Union representative for any Board jointly consider a case of sufficient urgency and importance to warrant an expedited hearing, a hearing shall be scheduled within fifteen (15) days of their request.

(f) A submission to a Board shall be in the form of a petition stating:

(1) the name of the employee involved;

(2) a statement that the remedies provided by Articles 29, 30 or Article 31, as the case may be, have been exhausted;

(3) a statement of the nature of the dispute (including question or questions at issue) and the basis for the jurisdiction of the Board;

(4) the position or contention of the party filing the petition.

(g) A petition shall be served upon the other party, who shall have the right, within fifteen (15) days after receipt to file a written answer.

(h) Five (5) copies of each petition and answer shall be delivered to the office of the General Board, which shall file the original and transmit one (1) copy thereof to each member of the appropriate Board.

(i) Employees and the Company may be represented at Board hearings by such person or persons as they may choose and designate. Evidence may be presented either orally or in writing or both.

(j) Upon the request of either party to the dispute, or of two (2) Board members, a Board shall summon wit-

nesses to testify at Board hearings. The number of witnesses who are employed by the Company shall not be greater than the number which can be spared without interference with the service of the Company.

(k) Except as provided by paragraph V.(b) of this Article, a majority vote of all members of a Board shall be competent to make a finding or a decision with respect to any dispute properly before it, and such finding or decision shall be final and binding upon the parties to such dispute.

(l) The failure of a Board to decide a dispute under the procedure established herein shall not serve to foreclose any subsequent rights or procedures which the Railway Labor Act, as amended, may provide with respect to the settlement of such disputes, and nothing herein shall be construed to limit, restrict or abridge the rights or privileges accorded to either the employees or to the employer, or to their duly Accredited Representatives, by said Act.

(m) Board findings and decisions shall be stated in writing and shall be rendered within thirty (30) days from the close of hearing, unless such period is extended by agreement of the parties to the dispute. In each case a copy of the finding or decision shall be furnished the Company, the Union and such employee or employees as are parties to the dispute. If a dispute arises as to the interpretation of the finding or decision, then, upon request of the Company, the Union or such employee or employees as are parties to the dispute, the Board shall interpret the finding or decision.

(n) The System General Board and each Area Board shall keep complete and accurate records of all matters submitted to it and of all findings and decisions made. A stenographic record at all Boards will be taken if requested by either party to the dispute. In such case, the cost of such record shall be borne by the requesting party. The other party, upon request, will be furnished a copy of the

record, in which case the cost of such record shall be borne equally by both parties to the dispute.

(o) Each party will assume the compensation, travel expenses and other expenses of the Board members selected by it and of the witnesses called or summoned by it.

(p) So far as space is available, witnesses who are employees of the Company shall receive free transportation over the lines of the Company from the point of duty or assignment to the point at which they must appear as witnesses and return, to the extent permitted by law.

(q) Each Board, upon agreement of a majority of its members, shall have the authority to incur expenses necessary for the proper conduct of the business of the Board. Such expenses, as well as the expense of each neutral referee, shall be shared equally by the parties hereto. Union Board members who are employees of the Company shall be granted necessary leaves of absence for the performance of their duties as Board members. So far as space is available, the Board members shall be furnished free transportation over the lines of the Company for the purpose of attending Board meetings to the extent permitted by law.

(r) Every Board member shall be free to discharge his duty in an independent manner, without fear that his individual relations with the Company or with the employees hereunder may be affected in any manner by any action taken by him in good faith in his capacity as a Board member. Each party shall specifically instruct each Board member selected that he shall at all times, while serving in that capacity, act not as a partisan or advocate of a partisan group or cause but shall act and serve solely to render impartial findings and just decisions.

APPENDIX B

CLASSIFICATION DESCRIPTION
TITLE I—AIRLINE MECHANIC
MECHANIC

SUMMARY

The work of the Mechanic classification, depending upon assignment, in addition to the work specified for the Junior Mechanic classification, includes any or all of the following: Performing skilled work in those operations such as trouble shooting, individually or with Crew Chief, management or professional direction, disassembly, checking and cleaning, repairing, replacing, testing, adjusting, assembling, installing, servicing, fabricating, taxiing or towing airplanes and/or run-up engines, deicing aircraft, required to maintain the airworthiness of aircraft and all their components while in service or while undergoing overhaul and/or modification. Certifies for quality of own workmanship, including signing mechanical flight releases, except signs mechanical flight release for all work done on field work. In those work positions where stock chasers are not maintained and/or available at the time may chase own parts. May have other Mechanic personnel assigned to assist him in completing an assignment. Works according to FAA and Company regulations and procedures and instructions from Crew Chief or supervisor. Completes forms connected with work assignments according to established procedures and will communicate with other Company personnel as required in a manner designated by the Company.

In addition to the above duties, performs the following duties as assigned: cleaning of aircraft windshields; connecting/removing ground power and ground start units; pushing out/towing of aircraft and related guideman functions.

APPENDIX G

RELEVANT PROVISIONS OF AMERICAN AIRLINES EMPLOYEE HANDBOOK

Section 3. Employee Policies

Peak Performance Through Commitment

Peak Performance Through Commitment (PPC), a process designed to correct problems rather than punish an individual for poor performance, demonstrates American's commitment to create a workplace where each employee is treated with dignity and respect. It is an action-oriented system intended to recognize, reinforce and reward an employee's best efforts. PPC encourages employees and their supervisors to work together as a team. However, employees remain responsible for their work performance and maintaining high standards.

PPC is a process of exchanging ideas and sharing information—keeping the lines of communication open. The dialogue between employees and supervisors may be corrective or motivational. This positive system recognizes and rewards employees with high performance and coaches and counsels employees with poor performance. When employees with poor performance or inappropriate personal conduct do not improve after coaching and counseling, the supervisor may initiate a series of advisory sessions:

- A first advisory session—when the employee fails to respond to coaching and counseling.
- A second advisory session—when the employee fails to respond to additional coaching and counseling.

- A "Career Decision Day"—a day off with pay when the employee is given a final opportunity to commit to change. A letter of commitment is given to the employee for review at this time.
- A final advisory session—when the employee fails to live up to the letter of commitment.

PPC is a proactive system intended to recognize, reinforce, reward and improve all job performances. Its success depends on our collective efforts.

Performance Appraisals

Appraisals are valuable opportunities for employees to gain insight into how job performance is viewed by the supervisors, how it can be improved and how it can be used to prepare for future responsibilities.

Performance evaluation and feedback systems exist in various formats depending on the work group. In all cases the purpose is to provide meaningful information to allow employees to correct performance deficiencies. The systems also encourage supervisors to reinforce excellent job performance.

For additional information see AA REGS 130-1, 130-4, and 130-5.

September, 1990

APPENDIX H

RELEVANT STATUTORY PROVISIONS

Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have

jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

RAILWAY LABOR ACT

Section 2, 45 U.S.C. § 151a

§ 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes

growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Section 2, 45 U.S.C. § 152

§ 152. General duties

* * * *

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employes as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization,

labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organzations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * * *

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and

authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election.

The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * * *

Section 3, 45 U.S.C. § 153

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * *

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

* * * *

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order

may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

* * * *

Section 5, 45 U.S.C. § 155

§ 155. Functions of Mediation Board

First. Disputes within jurisdiction of Mediation Board

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once

notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * * *

Section 204, 45 U.S.C. § 184

§ 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Ad-

justment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

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No. 92-1077

In The

Supreme Court of the United States

October Term, 1992

AMERICAN AIRLINES, INC.,

Petitioner,

v.

SCOTT DAVIES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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ISSUE PRESENTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Whether the United States Court of Appeals for the Tenth Circuit properly held that respondent's state law claim for termination in violation of public policy, based on petitioner's discharge for union organizing activity was not preempted by the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*?

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No. 92-1077

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AMERICAN AIRLINES, INC.,

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SCOTT DAVIES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Scott Davies ("DAVIES") respectfully submits this Brief In Opposition to petitioner, American Airlines, Inc.'s ("AMERICAN"), Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

JURISDICTIONAL ISSUE

Respondent received a copy of the Petition for Writ of Certiorari on December 28, 1992. This Brief In Opposition is timely filed under Rule 15.2 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

DAVIES was employed by AMERICAN at its Tulsa, Oklahoma facility as an aircraft mechanic. As a condition of employment, DAVIES was required to be a member of the Transport Workers Union ("TWU"), party to a collective bargaining agreement ("CBA") with AMERICAN.

In 1989, DAVIES and other AMERICAN mechanics initiated a petition drive calling for an election to determine whether the Airline Mechanics Fraternal Association ("AMFA") should replace the TWU. AMFA would have represented only skilled crafts, in contrast to the TWU which represented both skilled and unskilled classes and crafts. Additionally, AMERICAN employees were dissatisfied with TWU representation.

DAVIES was elected chairman of the AMFA organizing committee. In that capacity, DAVIES, on AMFA's behalf, placed a debate notice in a local newspaper containing the words "AMERICAN AIRLINES". AMERICAN disciplined DAVIES alleging he "ma[de] false or slanderous statements about the Company . . . " (Petition For Writ of Certiorari ("Petition"), App. 22a).

When DAVIES refused to capitulate to AMERICAN's pressure and desist from AMFA activities, he was fired to

quell AMFA's organizing efforts. Thereafter AMFA organizing activity ceased.

DAVIES, represented by the TWU, the same union he sought to replace, arbitrated his discharge. The System Board of Adjustment upheld his discharge but neither addressed nor even considered whether DAVIES was fired for a pretextual reason. (Petition, App. 20a-39a).

DAVIES sued AMERICAN in the United States District Court for the Northern District of Oklahoma ("District Court") for violation of public policy as set forth in the RLA, § 152 *Third*, prohibiting carrier "interference, influence, or coercion . . . in any manner to prevent the designation by its employees as their representatives . . . " DAVIES also alleged violation of public policy as embodied in the RLA, § 152 *Fourth*, prohibiting a carrier "deny[ing] or question[ing] the right of its employees to join, organize, or assist in organizing the labor organization of their choice. . . . "

DAVIES' diversity claim was decided by a jury which awarded $81,000 in actual damages and $15,000 in punitive damages. Following trial, the District Court sustained AMERICAN's motion for judgment notwithstanding the verdict ("JNOV"). *Davies v. American Airlines, Inc.*, No. 89-C-881-P, slip op. (N.D. Okla. Sep. 28, 1991). (Petition, App. 15a-19a).

The Court of Appeals for the Tenth Circuit ("Court of Appeals") reversed, finding no CBA interpretation necessary and that DAVIES' claim was not a "minor dispute" within the RLA purview. *Davies v. American Airlines, Inc.*, 971 F.2d 463, 465-466 (10th Cir. 1992), *reh'g denied*, September 8, 1992 (*"Davies"*).

SUMMARY OF ARGUMENT

The Court of Appeals correctly determined that no CBA interpretation was necessary to adjudicate DAVIES' state law claim, protecting Oklahoma citizens against discharge in violation of clear mandates of public policy. Because no CBA interpretation was required, no "minor dispute" under the RLA was implicated, and the RLA did not preempt DAVIES' state law action.

The Court of Appeals also correctly determined that DAVIES' state law claim did not encroach on the RLA's purview. Additionally, the Court of Appeals was correct that DAVIES' employment status did not affect his action for violation of public policy and that arbitration did not preclude an Oklahoma remedy.

REASONS FOR DENYING THE WRIT

A. OKLAHOMA LAW PROTECTS CITIZENS FROM WRONGFUL DISCHARGE, A MATTER OF SIGNIFICANT STATE CONCERN.

DAVIES' diversity action does not, as AMERICAN asserts, circumvent the RLA. Oklahoma law provides a remedy unavailable under the RLA only when a discharge contravenes "a clear mandate of public policy." *Burk v. K-Mart Corp.*, 770 P.2d 24, 28 (Okla. 1989) (AMERICAN briefing as *amicus curiae*).

DAVIES' *Burk* claim sought redress for his discharge because of union organizing activity. *Davies*, at 464. DAVIES' discharge violated the RLA's "public policy," § 152 *Third* and *Fourth*, because his discharge was

designed to interfere with employees' selection of a representative. A *Burk* action augments RLA protection by deterring carrier discharges inimical to public policy. A *Burk* claim actually effectuates the RLA's public policy by providing Oklahoma employees a remedy when a discharge violates the RLA's clear principles. Because *Davies* correctly evaluated the issues and followed precedent, this Court's review is unwarranted.

Since *Burk*, "public policy" violations under Oklahoma law have been found in a variety of sources. *See e.g. Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218, 1222 (Okla. 1992) (discharge for filing racial discrimination claim); *Sargent v. Central Nat. Bank & Trust Co.*, 809 P.2d 1298 (Okla. 1991) (discharge for refusing to alter audit report); *Todd v. Frank's Tong Service, Inc.*, 784 P.2d 47, 50 (Okla. 1989) (discharge for refusing to operate unsafe vehicle); *White v. American Airlines, Inc.*, 915 F.2d 1414, 1419 (10th Cir. 1990), *rev'd on other grounds* (retaliatory discharge for refusal to commit perjury); *Bishop v. Federal Intermediate Credit Bank*, 908 F.2d 662 (10th Cir. 1990) (retaliatory discharge for Congressional testimony).

This Court recognizes a state's substantial interest in its protecting citizens. *Cf. Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) (state law protection is not preempted by 29 U.S.C. §§ 141 *et seq.* Labor-Management Relations Act ("LMRA") when CBA interpretation not required); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211-12 (1985) (same); *Farmer v. United Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290 (1977) (29 U.S.C. §§ 151-169, National Labor Relations Act ("NLRA") did not preempt union official's tort claim).

Davies relied on *Tate v. Browning-Ferris, Inc., infra,* in reversing the District Court. *Davies,* at 468. *Tate* rebutted arguments that DAVIES' sole remedy was through RLA procedures and that the mere presence of an inadequate federal regulatory scheme did not preclude a *Burk* action: "By statutory mandate *the common law remains in full force in this state, unless a statute explicitly provides to the contrary.*" "*Where the common law gives a remedy, and another is provided by statute, the latter is merely cumulative, unless the statute declares it to be exclusive.*" *Id.,* at 1225-1226 (citations omitted, emphasis in original).

AMERICAN has consistently failed to support its protestation of how the RLA's purpose of "avoid[ing] interruption of commerce" would be undermined by *Burk* actions. By definition, *Burk* applies to "a narrow class of cases in which the discharge is contrary to a clear mandate of public policy." *Burk,* at 28. Because *Burk*'s application is so tightly circumscribed, no interference with federal labor regulation can be established. Furthermore, Oklahoma's protection against wrongful discharge, coupled with *Burk's* limited application is of paramount importance to evaluate preemption claims.

B. THE RAILWAY LABOR ACT SHOULD NOT BE EXERCISED TO PREEMPT MINIMAL STATE LAW PROTECTION.

A "minor dispute" is one which "require[s] CBA interpretation. Because Davies' *Burk* action does not require CBA interpretation, it is not a "minor" dispute,

and accordingly it is not preempted from judicial resolution." *Davies*, at 468. *See also, Lingle*, at 413; *Atchison T.& S.F. Ry. Co. v. Buell*, 480 U.S. 557, 564-565 (1987).

"Minor disputes" involve rates of pay, rules, or working conditions. RLA, 45 U.S.C. § 153 *First* (i) (1970). "Minor disputes" are to enforce CBA terms and may be resolved by CBA interpretation. *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 305 (1989).

The essence of AMERICAN's argument is that the mere existence of an employment relationship *ipso facto* confers RLA jurisdiction on *any* employment dispute. AMERICAN urges RLA preemption even when an employer's actionable conduct is unrelated to matters within CBA purview. Those broad preemption contentions have been rejected time and again. *Cf. Allis-Chalmers Corp. v. Lueck, supra; Farmer v. United Brotherhood of Carpenters & Joiners, Local 25, supra; Terminal Railroad Assoc. of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943).

The RLA does not divest courts of jurisdiction to decide actions based on violations of RLA principles. *See Price v. PSA, Inc.*, 829 F.2d 871, 876 (9th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988) (implied right of action exists under RLA, § 152 *Fourth*); *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 936 (9th Cir. 1987) (same); *Pikop v. Burlington Northern R. Co.*, 390 N.W.2d 743 (Minn. 1986), *cert. denied*, 480 U.S. 951 (1987); *Roscello v. Southwest Airlines Co.*, 726 F.2d 217, 220 (5th Cir. 1984) (private action under RLA, § 152 *Fourth*); *Burke v. Campania Mexicana De Aviacion*, 433 F.2d 1031, 1033 (9th Cir. 1970) (same).

Price v. PSA, Inc., infra addressed similar factual and parallel legal claims and construed the breadth of RLA preemption:

> . . . Congress has not indicated, as it did with LMRA § 301 and ERISA, that the RLA is "so powerful as to displace entirely any state cause of action." Absent a direct expression of congressional intent to create federal jurisdiction for all causes of action within the scope of section 2, Fourth of the RLA, we believe we must abide by the well-pleaded complaint rule.

Id. at 876 (citations omitted).

The "well-pleaded complaint rule," looks only to the plaintiff's allegations rather than a defendant's anticipated defenses. *Oklahoma Tax Com'n v. Graham*, 489 U.S. 838, 840-41 (1989); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99 (1987). State jurisdiction cannot be obviated "on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint . . . " *Caterpillar*, at 393.

The heart of *Davies* is that no CBA interpretation was required, applying only Oklahoma law to the jury's factual inquiry. *Id.* at 468. Of utmost significance is, that when adjudicating "purely factual questions . . . and the conduct and motivation of the employer," stripped of AMERICAN's legal parlance, the jury found AMERICAN culpable and awarded punitive damages. *Cf. Lingle, supra*, at 407.

AMERICAN cites *Lorenz v. CSX Transportation, Inc.*, ___ F.2d ___, 141 LRRM 2921 (4th Cir. 1992) and *Grote v. Trans World Airlines*, 905 F.2d 1307 (9th Cir. 1990), *cert.*

denied, ___ U.S. ___, 111 S.Ct. 386 (1990), asserting a conflict of circuits. *Lorenz* noted that the plaintiff "challenges CSX's conduct in the application of the investigatory procedures required by the [CBA]." *Id.* at 2924. Likewise, the gravamen of *Grote* was that the wrongful discharge arose from a CBA based obligation to pass a health examination. *Grote*, at 1309. *Davies* is distinguishable because nothing in his discharge implicated *any* CBA provision, including a "just cause" term. *Id.* at 466.

As a state law matter, certiorari should be denied: "As to questions controlled by state law, . . . conflict among the circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938). When reviewing state law questions, this Court "ordinarily [] accept[s] and therefore do[es] not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987), cogently rejected the same preemption argument AMERICAN advances:

> [I]ndividual employment contracts are not inevitably superseded by any subsequent collective agreement covering an individual employee, and claims based upon them may arise under state law. Caterpillar's basic error is its failure to recognize that a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as

> the contract relied upon is *not* a collective-bargaining agreement.

Id., at 396 (emphasis in original).

Atchison T.& S.F. Ry. Co. v. Buell, supra succinctly rejected a similar premise of RLA preemption: "It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the [Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.*] simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion." *Id.* at 565. It is just as inconceivable that Congress, through the RLA, intended to deprive aggrieved employees of minimal state protection afforded by *Burk*. Such a position would sanction wholesale public policy violations cloaked with protection of federal law.

Despite AMERICAN's legal ruminations, *Burk* was designed to prevent the very harm inflicted on DAVIES: "[T]he interests of the people of Oklahoma are not best served by a marketplace of cut-throat business dealings where the law of the jungle is thinly clad in contractual lace." *Id.* at 26, *quoting Hall v. Farmers Ins. Exchange*, 713 P.2d 1027, 1029 (Okla. 1985).

C. THE RLA NEITHER EXPLICITLY NOR IMPLICITLY PREEMPTS STATE PROTECTION.

Cipollone v. Liggett Group, Inc., ___ U.S. ___, 112 S.Ct. 2608 (1992) found that federal law should be construed against preemption of state police power, that Congressional enactments do not automatically pre-empt other

regulation, and looked to inherent conflict between federal and state regulations. *Id.* at 2618. *See also, English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). Absent an "actual conflict," state law is not pre-empted. *Id.* at 90; *Tate v. Browning-Ferris, Inc., supra,* at 1222.

With *Burk's* "tightly circumscribed" application, the specter of interference with federal law advanced is illusory. *Only* when employers contravene public policy does *Burk* protect against reprisals as DAVIES suffered. Clearly, the RLA does not encompass every employment dispute. *See Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co.*, 372 U.S. 284, 289-90 (1963); *Terminal Railroad Assoc. of St. Louis, supra,* at 6-7.

Under *Cipollone,* there is no conflict between the RLA and a *Burk* action. *Farmer, supra,* noted that when Congress did not provide "specific directions with respect to the scope of preempted state regulation," not all local regulation which concerns employment is preempted. *Farmer,* at 295-96.

Cipollone recognized that "state regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone,* at 2620 *quoting San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247 (1959). Oklahoma's protection against "a marketplace of cut-throat business dealings" together with damage award deterrents, merely implement *Burk's* protection.

Davies correctly found no encroachment into the RLA's regulatory scheme. *Cf. Cipollone,* at 2618. *Accord,*

Atchison T.& S.F. Ry. Co. v. Buell, supra at 566-567 (FELA emotional injury action would not wreak havoc with RLA; absent an intolerable conflict, RLA does not repeal any part of the FELA).

Courts frequently rely on other labor enactments in construing RLA application. *Cf. Brotherhood of Ry. Trainmen v. Terminal Co.*, 394 U.S. 369 (1969) (NLRA used to construe RLA); *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 692 (1963) (same), *Roscello v. Southwest Airlines Co., supra*, at 222 (same).

AMERICAN argues that the LMRA, upon which *Lingle* was decided, should not apply to RLA cases (Petition, at 8). However, the pervasive RLA preemption to which AMERICAN alludes refers to the NLRA's original regulatory scheme dating to the Wagner Act, as administered by the National Labor Relations Board. Now, the entire NLRA includes the Taft-Hartley Act of 1947 amendments, 29 U.S.C. § 185, Section 301, embodied in the NLRA and enforced by the National Labor Relations Board. Most CBAs include exclusive grievance and arbitration provisions, exactly paralleling the RLA's arbitration remedy. *Cf. Allis-Chalmers Corp v. Lueck, supra*, at 220. Also, this Court very recently declined to review the propriety of *Lingle*'s preemption test in RLA cases. *O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1 (1st Cir. 1992) *cert. denied*, ___ U.S. ___, 61 U.S.L.W. 3478 (No. 92-870, Jan. 11, 1993).

D. THE EMPLOYMENT STATUS OF A RETALIATORY DISCHARGE VICTIM IS IMMATERIAL WHEN ADJUDICATING STATE PROTECTION.

Both AMERICAN and District Court reliance on "at-will" status was "essentially a variant of . . . *Burk* [being] unavailable where a discharged employee has an alternate remedy." *Davies*, at 469. *Davies* recognized that "[w]hen an employer discharges an employee in violation of such a public policy, society is equally aggrieved whether the employee is "at-will" or can be discharged only for "just cause[]" and "parties to a contract may not incorporate in it rights and obligations which are clearly injurious to the public." *Id.*, at 469 (citations omitted). *See also, Southwest Forest Industries v. Sutton*, 868 F.2d 352, 355 (10th Cir. 1989) (it is a "disturbing proposition" that union employees must surrender tort remedies not considered in collective bargaining).

Commodore v. University Mechanical Contr., 839 P.2d 314, 318-319 (Wash. 1992), a state law tort action rejecting LMRA, § 301 preemption similarly rejected defendant's "just cause" defense:

> In passing section 301, Congress did not intend to give union workers fewer rights than non-union workers. If an employer could eliminate a union member's right to bring a state law action simply by asserting a defense requiring CBA interpretation, employees would see unionization as a less desirable alternative.

Id., quoting Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209, 229 (1989) (footnote omitted).

Tate v. Browning-Ferris, Inc., supra, relied on *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974), noting that the Civil Rights Act, Title VII, 42 U.S.C. § 2000e *et seq.* ("Title VII") allowed "multiple enforcement fora." *Tate,* at 1222-1223, n. 13. *Tate* found Title VII protection a "floor beneath which federally provided protection may not drop." *Id.,* at 1222. Similarly, *Davies* held that *Burk* was to protect society by carrying out public policy. *Davies,* at 469.

E. ARBITRATION WHICH OMITS CONSIDERATION OF A PRETEXTUAL DISCHARGE AFFORDS NO REMEDY FOR WRONGFUL TERMINATION AND CANNOT PRECLUDE MINIMAL STATE REMEDIES.

Claiming Adjustment Board appeal was DAVIES' sole remedy, AMERICAN omits that the arbitration award did not consider a pretextual discharge. (Petition, App. 20a-39a). It defies credulity to suggest that arbitration provides a "remedy" while overlooking the employer's true motivation. Adjustment Board appeal is absurd when AMERICAN's underlying motive could not be examined.

The Court of Appeals acknowledged that arbitrators may lack expertise to adjudicate questions of law rather than interpreting a CBA. *Davies,* at 467. *Accord, Barrentine v. Arkansas-Best Freight System,* 450 U.S. 728, 743 (1981) (arbitration forum inadequate to enforce minimum wage statutes); *Alexander v. Gardner-Denver Co., supra* at 53 (arbitrators lack authority to invoke public laws); *Southwest Forest Industries v. Sutton, supra,* at 355 (arbitration

remedies inadequate when discharge contravenes public policy).

AMERICAN's exclusive remedy claims also ignore that DAVIES would be represented by the TWU, the same union he sought to replace. *Cf. Glover v. St.Louis-San Francisco Railway Co.*, 393 U.S. 324, 330 (1969) (Adjustment Board submission not mandatory when remedy is wholly futile or must be submitted to group against whom complaint is made). *See also, Barrentine, supra,* at 742 (union may sacrifice individual's rights to those of entire bargaining unit).

AMERICAN's claim that employees "try out" arbitration deliberately disregards that an arbitrator's expertise is in the law of the shop rather than the law of the land. An arbitral "remedy" failing to consider pretextual reasons cannot be regarded as a remedy at all. Analysis of state-law and contractual considerations premised on the same facts is consonant with this Court's rulings. *Lingle, supra,* at 408; *Davies,* at 466.

CONCLUSION

There are no issues which justify granting *certiorari*. The Court of Appeals correctly found that DAVIES' state law action was not preempted by the RLA. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN AIRLINES, INC., PETITIONER

v.

SCOTT DAVIES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

Nothing in Respondent's Brief in Opposition ("Opp.") validly questions the important issue of federal preemption presented by the Petition. The Railway Labor Act ("RLA") relies upon an enforcement scheme that carefully balances labor arbitration and limited federal court jurisdiction to secure the Act's goals and to foster labor-management relations. There simply is no room for state tort jurisdiction. It is important for the Court to grant the Petition and rectify the destabilizing labor relations impact on air and rail carriers that results from the court of appeals' decision.[1]

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[1] The recurring character of this issue is evident in different ways. Only three days before the court of appeals issued its opinion below, another Oklahoma district court held that the RLA preempted a claim of wrongful discharge in violation of public policy in *Farley v. American Airlines*, C.A. No. 91-C-775-C (N.D. Okla. July 6, 1992). Recently, the Hawaii Supreme Court held that the RLA did *not*

I. DAVIES' CLAIM IS A MINOR DISPUTE BECAUSE HIS DISCHARGE WAS ARGUABLY JUSTIFIED UNDER THE LABOR CONTRACT.

Like the court of appeals below, Davies fails even to address *Conrail*'s test for "minor" dispute preemption under the RLA: if the carrier's disputed action is "arguably justified" by the collective bargaining agreement, the dispute is minor and exclusively committed to an Adjustment Board. *See* 491 U.S. at 307. Instead, Davies proposes that an employee may sidestep the RLA's exclusive procedures merely by claiming that the carrier's true reason for discharging him violates public policy, as long as the assertion of that claim does not itself depend on the labor contract. Davies cites not a single case on point, and the authorities he does cite are inapposite and cannot justify carving an exception to exclusive Adjustment Board jurisdiction whenever an employee elects to clothe his discharge grievance in public policy garb.

First, Davies relies on cases that, as a matter of *state* law, extend the cause of action for wrongful discharge in violation of public policy to employees covered by union contracts. Opp. at 6, 13, citing *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218 (Okla. 1992); *Southwest Forest Indus. v. Sutton*, 868 F.2d 352 (10th Cir. 1989) (applying Kansas law), *cert. denied*, 494 U.S. 1017 (1990). Davies thus confuses state-law determinations concerning the breadth of state wrongful discharge claims with federal-law decisions concerning the scope of minor dispute preemption. The former do not and cannot control the latter; rather, it is the extent of minor dispute preemption that sets the ultimate limit of the state-law claim. *Tate* and *Sutton* do not suggest otherwise; indeed, they do not even address

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preempt a virtually identical claim in *Norris v. Hawaiian Airlines*, 142 L.R.R.M. (BNA) 2201 (Haw. S. Ct. Dec. 16, 1992). American has been informed that a petition for certiorari in that case will be filed shortly.

preemption issues since neither plaintiff was employed under a union contract.[2]

Davies also invokes three decisions of this Court rejecting the exclusivity of arbitration with respect to claims arising under certain *federal* statutes. *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557 (1987) (FELA); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981) (FLSA); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII). Those cases stand for the unremarkable proposition that, while states cannot determine the boundaries of federal preemption, Congress obviously can. In all three cases, this Court recognized the need to accommodate the RLA to *federal* statutes designed to provide minimum substantive guarantees to individual workers, where Congress specifically intended those rights to be enforced in federal court. *Buell*, 480 U.S. at 564-66; *Barrentine*, 450 U.S. at 737, 739-40, 745; *Alexander*, 415 U.S. at 48, 51, 56. In this case, by contrast, there is no expression of congressional intent to permit states to exempt employees from the statutorily exclusive jurisdiction of the RLA Adjustment Boards.[3]

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[2] For the same reason, Davies' argument that certiorari should be denied based upon this Court's standards for reviewing state-law determinations (Opp. at 9) is misplaced. The Petition does not challenge Part II of the court of appeals' opinion below, which held as a matter of state law that Oklahoma would recognize a cause of action for wrongful discharge in violation of public policy brought by a union-represented employee. (App. 11a-14a). The Petition is limited to federal-law issues of RLA preemption.

[3] *Terminal R.R. Ass'n of St. Louis v. Brotherhood of R.R. Trainmen*, 318 U.S. 1 (1943), does not suggest a different result. In that case, the Court rejected a railroad's challenge to an Order of the Illinois Commerce Commission that required cabooses on trains to prevent injury to rear switchmen who previously had to ride on top or beside the train. The case did not present a dispute between the carrier and its employees; indeed, the Court assumed without deciding that, if it had, the dispute would have been subject to the jurisdiction of the Adjustment Board. Rather, the court held that the RLA did not so occupy the field of working conditions that it

Finally, Davies cites a state-court decision holding various tort claims not preempted by the Labor-Management Relations Act ("LMRA"), because the *claims* themselves were not based on the labor contract. *Commodore v. University Mechanical Contractors*, 839 P.2d 314 (Wash. 1992). This reasoning, which drives the court of appeals' opinion below, does not reflect the law even under the LMRA, much less the RLA, and should be rejected.

The court in *Commodore* expressly adopted its approach from a law student Note, describing it as "both workable and true to the language and holding of *Lingle*." 839 P.2d at 319. However, as the Note itself concedes, *Lingle*'s test was whether the "*resolution*" of a claim requires contract interpretation; under that formulation, a claim would be preempted if either the claim *or the employer's defense* involved interpretation of the contract. Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209, 209-11, 219 (1989). As American argued in its Petition (at 16-18), American's defense to Davies' wrongful discharge claim was based on his violation of rules and policies that made up part of the labor contract. That defense necessarily required the jury to interpret the labor contract in order to determine whether, as Davies alleged, American's stated reason for the discharge was a pretext. Federal labor policy, however, is equally violated when a jury interprets a collective bargaining agreement in the context of a plaintiff's claim or an employer's defense.

Davies repeatedly tries to minimize the significance of this case by suggesting that the public policy exception to preemption is a narrow one requiring "a clear mandate of public policy." Opp. at 4, 6, 11. That is not so. As American noted earlier, the breadth of such policies is virtually unlimited. Petition at 8-9. Moreover, nothing in *Commodore* or the decision below would limit an allegation

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precluded minimum state police-power regulations concerning safety and health. *Id.* at 6-7.

of pretextual discharge to a clear and narrow public policy. The policy could be anything not favored by state law; so long as it was not based on the collective bargaining agreement, the claim would not be preempted.

II. DAVIES' AUTHORITIES AFFIRM THAT WRONGFUL DISCHARGE CLAIMS BASED ON UNION ORGANIZING ACTIVITIES CAN BE BROUGHT ONLY UNDER SECTION 2 FOURTH OF THE RLA.

Assuming *arguendo* that Davies' claim were not preempted as a minor dispute, his efforts to avoid the preemptive effect of Section 2 Fourth of the RLA are unavailing. Davies asserts that his state-law claim effectuates RLA policy by providing Oklahoma employees a remedy for RLA violations, and consequently does not conflict with the RLA. Opp. at 4-5. State law, he argues, is not preempted absent an "actual conflict" with federal law. Opp. at 11, *citing Cipollone v. Liggett Group, Inc.*, 505 U.S. ——, 112 S. Ct. 2608 (1992) and *English v. General Elec. Co.*, 496 U.S. 72 (1990).

This argument misconceives preemption doctrine and miscites both *Cipollone* and *English*. As reaffirmed in each of those cases, preemption is a matter of congressional intent. That intent may be express in the statute, or it may be implied if the state law actually conflicts with federal law *or* if it "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English*, 496 U.S. at 79.[4] Such an intent may be inferred from a "scheme of federal regulation . . . so

[4] In addition to ignoring the preemption test discussed in both *Cipollone* and *English*, Davies misreads the contexts in which those cases addressed the issue of conflict with federal law. *Cipollone* was a case of express preemption. In such cases, implied preemption is inapposite, and preemption is determined solely in terms of the express language of Congress. 112 S. Ct. at 2618. In *English*, the Court's discussion concerning the absence of actual conflict occurred only after the Court had determined that there was no implied or "field" preemption. 496 U.S. at 86-87, 90.

pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or from a federal statute that addresses "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), quoted in *English*, 496 U.S. at 79.

It is evident from the structure and purpose of the RLA that Congress has pervasively occupied the field of carrier/employee disputes addressed in Section 2 of that Act. *See* Petition at 12-14. *See also O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1, 4 (1st Cir. 1992) ("RLA established a comprehensive conflict resolution procedure for railroad labor disputes"), *cert. denied*, —— U.S. ——, 1992 WL 353557 (Jan. 11, 1993). Similarly, there is a dominant federal interest in a uniform national labor policy and in the single federally prescribed system of dispute resolution.[5] The RLA leaves no room for state supplementation in these areas.

Davies' only response to such arguments is to assert that the RLA does not divest courts of jurisdiction to decide actions based on violations of RLA principles. Opp. at 7. He cites five cases for that alleged proposition. However, not one of them recognizes a state-law claim based on a violation of the RLA. Two of the cases did not involve alleged violations of the RLA at all.[6] The other three

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[5] In *English*, in concluding that there was no field preemption, this Court expressly distinguished the preemptive effect of the National Labor Relations Act, which (like the RLA) "comprehensively deals with labor-management relations from the inception of organizational activity through the negotiation of a collective-bargaining agreement." The Court further noted that special factors support the preemption of state labor relations law—specifically, Congress' perception that state legislatures and courts were not able to provide an informed and coherent labor policy. 496 U.S. at 86-87 n.8.

[6] *Pikop v. Burlington N. R.R.*, 390 N.W.2d 743 (Minn. 1986), *cert. denied*, 480 U.S. 951 (1987), held that the RLA did not pre-

cases merely reaffirm the existence of an implied *federal* cause of action to enforce Section 2 Fourth under the RLA.[7] None of them suggests or supports the extraordinary conclusion that an RLA-covered employee can bring a state common-law action to enforce the RLA. Davies' attempted reliance on a state-law claim allegedly intended to promote the policy goals of the RLA is particularly misguided in view of his voluntary abandonment of his federal claim based directly on the RLA itself. *See* Petition at 4.

III. ARBITRATION BOARDS ARE FULLY COMPETENT TO RULE ON CLAIMS OF PRETEXTUAL DISCHARGE, AND IN ANY EVENT THE REMEDY FOR ANY DEFECT IS PROVIDED BY FEDERAL LAW, NOT STATE LAW.

Davies argues that arbitration was an inadequate forum in which to litigate his claim, for three reasons: (1) American's motive was not and could not have been examined; (2) arbitrators lack expertise to adjudicate questions of law; and (3) Davies was represented by the TWU, the same union he sought to replace. Opp. at 14-15. None of these reasons defeats preemption of his claim.

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empt claims of intentional infliction of emotional distress based upon sexual and racial harassment. The court specifically noted that if the plaintiffs had been suing for wrongful discharge, their claims would have been preempted as minor disputes. *Id.* at 750. *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988), did involve an allegation of retaliation for union organizing, but in violation of the California Labor Code. In remanding the case to the state court, the Ninth Circuit explicitly stated that it expressed no opinion on the merits of the preemption defense itself, declaring its confidence in the ability and willingness of state courts to enforce federal defenses. *Id.* at 876.

[7] *Arcamuzi v. Continental Air Lines*, 819 F.2d 935, 936 (9th Cir. 1987); *Roscello v. Southwest Airlines*, 726 F.2d 217, 220 (5th Cir. 1984); *Burke v. Compania Mexicana de Aviacion*, 433 F.2d 1031, 1033 (9th Cir. 1970).

First, the suggestion that arbitrators cannot evaluate the motivation for a discharge is nonsense. Arbitrators, like judges, routinely evaluate issues of motivation and credibility. For the same reason, arbitrators are fully capable of addressing claims of pretextual discharge, which is the only relevant legal issue presented in connection with a claim of wrongful discharge in violation of public policy.[8]

In Davies' case, the Arbitration Board did not consider whether American's "true" reason for discharging Davies was retaliation for his union-organizing activities. That issue was not argued to the Board. (App. 34a-35a). It is not apparent from the record whether Davies chose not to raise the issue or whether he wanted to assert it but was overridden by his union representative, the TWU. If the former, Davies cannot be heard to complain. If the latter, it is *federal* law, in the form of a duty of fair representation claim arising under the RLA, that provides the remedy. *See Glover v. St. L.-S.F. Ry.*, 393 U.S. 324 (1969).

Finally, assuming *arguendo* that arbitration was somehow inappropriate and thus not exclusive, Davies' alternative was a federal cause of action under Section 2 Fourth of the RLA. Davies was fully aware of the availability of this remedy—indeed, he amended his original Complaint to assert that cause of action and amended his jurisdictional basis to include federal question jurisdiction. In his second Amended Complaint, while fully aware that American was challenging his state-law action as preempted by the RLA, Davies elected to abandon the federal cause of action under

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[8] An arbitrator would never need to confront the only other legal question that arises in connection with such claims: whether the "policy" at issue is one that the state would recognize as the basis for a wrongful discharge claim. That issue would be moot in arbitration because a discharge not justified under a collective bargaining agreement would be overturned for lack of "just cause" whether or not the employer's motive violated "public policy."

Section 2 Fourth. He thereby assumed the risk that the court might hold his state-law claim preempted and dismiss his Complaint. Davies cannot now claim prejudice if this Court reverses the judgment below and orders that result.

CONCLUSION

For all of the foregoing reasons, and the reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

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February 16, 1993

No. 92-1077

In the Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN AIRLINES, INC., PETITIONER

v.

SCOTT DAVIES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether respondent's civil action challenging his dismissal for union activity is barred by 45 U.S.C. 153 First (i) and 184, which make the Railway Labor Act arbitration procedures the exclusive remedy for certain employment disputes.

2. Whether 45 U.S.C. 152 Third and Fourth, which give covered employees the right to organize and bargain collectively without interference by the employer, preempt state-law tort remedies for retaliatory discharges in violation of that federal right.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner employed respondent as an aircraft mechanic in Tulsa, Oklahoma. Respondent was covered by a collective bargaining agreement between petitioner and the Transport Workers Union (TWU). That agreement allowed petitioner to discharge respondent only for "just cause." Pet. App. 2a, 17a-18a.

Respondent served on the organizing committee of the Airline Mechanics Fraternal Association (AMFA), which was seeking to have a representation election held for the craft employees represented by the TWU. On October 9,

1989, respondent placed an advertisement in the local newspaper, announcing a debate between representatives of the TWU and the AMFA. Without petitioner's authorization, respondent placed the name "American Airlines" in the advertisement's heading. The advertisement was directed to all skilled labor and announced the participants, place, and time of the debate. Pet. App. 21a-22a, 25a.

After concluding that the advertisement violated its work rules, petitioner instituted formal disciplinary action against respondent. On October 19, 1989, petitioner concluded that respondent's unauthorized use of the words "American Airlines" in the advertisement violated work rule 21, which prohibits employees from making "false or slanderous statements about the Company," and work rule 24, which forbids employees from performing any act "detrimental" to the welfare of the company or fellow employees. Petitioner then informed respondent that he would either have to sign a letter of commitment agreeing to comply with company rules and regulations or be discharged. Pet. App. 22a-23a.

Respondent refused to sign the letter of commitment. Instead, on October 20, 1989, he filed suit in the United States District Court for the Northern District of Oklahoma, seeking a temporary restraining order against his dismissal. Respondent alleged that petitioner was terminating him because of his union organizing activities, in violation of the Railway Labor Act (RLA), 45 U.S.C. 152 Fourth. See Pet. C.A. App. Exh. 2. Later that day, petitioner discharged respondent (Pet. App. 24a), rendering his motion for a temporary restraining order moot.

Respondent initiated an arbitration proceeding, contending that his conduct did not violate the work rules. Pet. App. 34a-35a. He did not contend, however, that his termination was motivated by anti-union animus. *Ibid.* The grievance was referred to a System Board of

Adjustment, consisting of a company representative, a union representative, and a neutral referee. On January 24, 1990, the Board determined that respondent had violated the work rules and that discharge was an appropriate sanction. The Board noted that petitioner had explained to respondent that great harm could result from unauthorized use of petitioner's name, particularly in connection with an inter-union dispute. Nevertheless, the Board explained, "he remained recalcitrant in admitting error or in committing to desist from such action in the future." Pet. App. 38a-39a. Finally, the Board observed that respondent had offered a "patently absurd excuse" for his actions—specifically, that he had used the words "American Airlines" to refer not to petitioner, but to all airlines in America. *Id.* at 36a, 39a. Under those circumstances, the Board upheld the discharge. *Id.* at 39a. The Board did not, however, address petitioner's motivation for the termination.

2. While the arbitration proceedings were pending, respondent pursued the present civil action against petitioner in federal district court.[1] Respondent's amended complaint alleged that he was terminated "in retaliation for his attempts to organize and designate union representation of his choice" and that petitioner's action violated "public policy as found within * * * the Railway Labor Act, 45 U.S.C. § 152 Third and Fourth" and other sources of federal law. Pet. C.A. App. Exh. 10, at 1.[2]

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[1] In his first amended complaint, respondent alleged that federal jurisdiction was proper because he was alleging a violation of his rights under the RLA, 45 U.S.C. 152 Third and Fourth, to designate union representation without employer interference. See Pet. C.A. App. Exh. 3, at 1. In his second amended complaint, respondent relied on diversity of citizenship under 28 U.S.C. 1332. See Pet. C.A. App. Exh. 10, at 1.

[2] In addition to the RLA, respondent relied on the First Amendment and the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq*. See Pet. C.A. App. Exh. 10, at 1-2.

Respondent sought compensatory and punitive damages and either reinstatement or "front pay." *Id.* at 2.

Although the jury awarded respondent $81,000 in compensatory damages and $15,000 in punitive damages (Pet. 5), the district court granted petitioner's motion for judgment notwithstanding the verdict. First, the court noted that because respondent was not an at-will employee, he could not bring a state tort action for "the discharge of an at-will employee in violation of public policy." Pet. App. 18a (discussing *Burk* v. *K-Mart Corp.*, 770 P.2d 24 (Okla. 1989)). Second, the trial court held that, in any case, a state-law public policy tort was unavailable, because of the existence of an alternative remedy under the RLA. Pet. App. 18a-19a; see *id.* at 11a.

3. The court of appeals reversed. The court first observed that the RLA provides an exclusive arbitral remedy for "disputes * * * growing out of grievances or out of the interpretation or application" of collective bargaining agreements. 45 U.S.C. 153 First (i); see 45 U.S.C. 184; Pet. App. 4a. The court determined, however, that the tort action brought by respondent is not within the class of disputes covered by Sections 153 First (i) and 184, which are referred to under RLA case law as "minor disputes."[3] Relying on *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), a case arising under Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. 185, the court of appeals held that a state-law claim is preempted by the arbitral provisions of the RLA if the resolution of the claim depends on the meaning of the collective bargaining agreement. Pet. App. 6a.

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[3] The terms "major dispute" and "minor dispute" do not appear in the RLA. Instead, this Court "adopted the major/minor terminology, drawn from the vocabulary of rail management and rail labor, as a shorthand method of describing two classes of controversy Congress had distinguished in the RLA: major disputes seek to create contractual rights, minor disputes to enforce them." *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 299, 302 (1989).

In the court's view, respondent's retaliatory discharge suit could be resolved without reference to the meaning of the collective bargaining agreement. As the court explained, "[t]he gravamen of [respondent's] action is that [petitioner's] actual or primary motivation in firing him, irrespective of any 'just cause' it may have had under the [collective bargaining agreement], was to stop his unionizing activity." Pet. App. 7a.[4]

4. In its petition for rehearing, petitioner argued for the first time that even if respondent's claim was not a minor dispute, remediable solely through arbitration, any state-law action based on retaliation for union organizing activity would be preempted by 45 U.S.C. 152 Third and Fourth—the provisions of the RLA that guarantee employees the right to select their collective bargaining representatives free of employer interference or coercion. On September 8, 1992, the court of appeals denied the petition without addressing that issue. Pet. App. 40a-41a.

DISCUSSION

In our view, the court of appeals correctly held that the claim in this case is not subject to the RLA's exclusive arbitral mechanism. The courts of appeals have consistently found that the RLA's exclusive arbitral mechanism for contract disputes does not foreclose a judicial remedy to vindicate the federal statutory right of rail and airline employees to select representatives of their choosing without employer interference. At the same time, we believe that respondent was required to bring his claim as a federal cause of action under the provisions of the RLA that protect an employee's union organizing activities, 45 U.S.C. 152 Third and Fourth, and not as a state-law claim.

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[4] The court of appeals also concluded that the state tort action for wrongful discharge in violation of public policy was not available only to at-will employees. Pet. App. 11a-14a. Hence, it reversed the trial court's award of judgment notwithstanding the verdict and reinstated the jury verdict in favor of respondent. *Id.* at 14a.

Petitioner did not timely raise this preemption issue, however, so it was never addressed by the court of appeals. There is no basis for concluding that the Tenth-Circuit (or any other court of appeals) would allow such a state-law action to proceed if the employer properly raises this preemption defense in a timely manner. Accordingly, there is no conflict in authority that warrants review at this time.

1. The Railway Labor Act, 45 U.S.C. 151 *et seq.*, was enacted, *inter alia*, to establish a mechanism for "the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. 151a(5); see 45 U.S.C. 153 First (i) (establishing arbitral mechanism for such disputes); 45 U.S.C. 184 (arbitral provision for such disputes in airline industry).[5] In resolving those so-called "minor disputes" (*Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 723 (1945), aff'd on rehearing, 327 U.S. 661 (1946)), the RLA first requires the parties to resort to a carrier's "internal dispute resolution processes." *Atchison, T. & S.F. Ry.* v. *Buell*, 480 U.S. 557, 563 (1987); see 45 U.S.C. 153 First (i), 184. If a dispute cannot be resolved internally, either party may then refer it to "arbitration before the National Railroad Adjustment Board * * * or before an adjustment board established by the employer and the unions representing the employees." *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 299, 303-304 (1989) (*Conrail*); see 45 U.S.C. 153 First (i), Second.

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[5] Such disputes involve "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Brotherhood of R.R. Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30, 33 (1957); see H.R. Rep. No. 1944, 73d Cong., 2d Sess. 2-3 (1934) (the bill "provide[s] sufficient and effective means for the settlement of minor disputes known as 'grievances', which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages and working conditions").

The submission of a dispute to arbitration is compulsory upon the request of either party. 45 U.S.C. 153 First (i), Second; see 45 U.S.C. 184; see also, *e.g.*, *Conrail*, 491 U.S. at 303; *Walker* v. *Southern Ry.*, 385 U.S. 196, 198 (1966). The decisions of an adjustment board are "final and binding." 45 U.S.C. 153 First (m), Second; see *Conrail*, 491 U.S. at 303.[6]

2. Petitioner argues that respondent's allegations of tortious activity should not have been adjudicated outside the arbitral process. In our view, the court of appeals correctly determined that respondent's tort claim—alleging that he had been discharged in violation of the RLA's policy against interfering with an employee's choice of union representative (45 U.S.C. 152 Third and Fourth)—is not a minor dispute subject to the exclusive arbitral mechanism of the Act.

a. The proper framework for evaluating the existence of a minor dispute is set forth in this Court's decision in *Conrail*, *supra*. In that case, the Court addressed whether a dispute over the carrier's implementation of an employee drug testing program was a "major" dispute over a change in the collective bargaining agreement—subject to the RLA's bargaining and mediation provisions—or a "minor" dispute—subject to compulsory arbitration.

In holding that the controversy at issue was a minor dispute, the Court in *Conrail* looked "to whether a claim

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[6] A similar scheme exists for the airline industry—to which Congress extended the RLA in 1936. Act of Apr. 10, 1936, ch. 166, 49 Stat. 1189; see 45 U.S.C. 181-188; *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 685 (1963) (the purpose of the 1936 legislation was "to extend to air carriers and their employees the same benefits and obligations available and applicable in the railroad industry"). The principal difference, which is not material here, is that no national adjustment board has been established for airlines; hence, minor disputes are adjudicated exclusively by system adjustment boards formed by the airlines and the unions under 45 U.S.C. 184. See *Conrail*, 491 U.S. at 304 n.4; *Central Airlines*, 372 U.S. at 686.

has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action." 491 U.S. at 305. As the Court explained, "[t]he distinguishing feature of such a case [*i.e.*, a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [collective bargaining] agreement." *Ibid.* The Court made plain, moreover, that parties may not trigger the RLA's exclusive arbitral framework merely by asserting a contractual claim based on "insubstantial grounds." *Id.* at 306. Rather, when "an employer asserts a contractual right to take [a] contested action, the ensuing dispute is minor [only] if the action is arguably justified by the terms of the parties' collective-bargaining agreement." *Id.* at 307.

b. The conclusion of the court of appeals that respondent's tort claim does not constitute a minor dispute is fully supported by this Court's decision in *Conrail*. Irrespective of any terms of the collective bargaining agreement, respondent's claim cannot be "conclusively resolved" (*Conrail*, 491 U.S. at 305) by interpreting that agreement. As the Tenth Circuit explained, the tort claim in this case turned on a factual dispute about petitioner's motivation for terminating respondent—an issue that was not even addressed in the grievance proceedings. Because a collective bargaining agreement cannot eliminate substantive legal protections provided to employees independent of the agreement (see *Buell*, 480 U.S. at 563; *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 212 (1985) (LMRA)), the tort claim in this case could not be resolved by adjudicating the distinct legal question whether there was just cause for respondent's discharge under the labor contract. Pet. App. 6a. Respondent could not prevail on his tort claim even if he proved that petitioner lacked just cause to dismiss him under the contract, because the tort alleged required proof of unlawful animus. Conversely, even if the court found that respondent's work-rule violations gave petitioner just cause to discharge him

under the collective bargaining agreement, that finding could not "arguably justif[y]" (*Conrail*, 491 U.S. at 307) a discharge motivated by anti-union animus. In other words, as the court below concluded, this case does not present a minor dispute because "[t]he gravamen of [respondent's] action is that [petitioner's] actual or primary motivation in firing him, irrespective of any 'just cause' it may have had under the [collective bargaining agreement], was to stop his unionizing activity." Pet. App. 7a.

c. Petitioner contends that the court of appeals' analysis is insufficiently protective of the RLA's exclusive arbitral mechanism. Petitioner would read the "arguably justified" language in *Conrail* to require arbitration in motive-based tort cases whenever a carrier couches its factual defense in the legal terms of the collective bargaining agreement. Pet. 15-18. This argument misconstrues *Conrail* and the statutory scheme.

i. There were two aspects of the inquiry into whether a minor dispute existed in *Conrail*. First, the Court found that a minor dispute is one that may be "conclusively resolved" under the collective bargaining agreement. 491 U.S. at 305. Second, even if that threshold requirement is met, a dispute may not be subject to arbitration as a minor dispute if the basis for the contract claim is insubstantial —that is, if the conduct is not even "arguably justified" under the contract. *Id.* at 306-307. Petitioner seeks to turn that framework on its head. Although petitioner framed its defense in a way that referenced the contract—by arguing that it had just cause to dismiss respondent for violating the work rules under the collective bargaining agreement—respondent was not required to dispute that issue under applicable tort standards. The legal issue of just cause simply could not, as set forth, "conclusively resolve" a tort claim that turns on the factual question whether petitioner terminated respondent because of anti-union animus.

ii. Petitioner's interpretation of the statute would result in unduly broad preemption of state tort law, in contravention of this Court's precedents. Because "the text of the RLA does not mention * * * tort liability" (*Buell*, 480 U.S. at 562), the Act does not preempt States from adopting minimum substantive tort law duties, even if those duties relate to employment relationships covered by the Act. That conclusion is evident from this Court's decision in *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U.S. 714 (1963). There, this Court rejected the claim that the RLA preempted a state statute "protecting employees against racial discrimination." *Id.* at 724. As the Court emphasized, "[n]o provision in the [RLA] even mentions discrimination in hiring," and nothing in the Act "suggests that [it] places upon an air carrier a duty to engage only in fair nondiscriminatory hiring practices." *Ibid.* Because the RLA "has never been used for that purpose," this Court found that the RLA did not preempt the state anti-discrimination statute at issue. *Ibid.*

In light of *Colorado Anti-Discrimination Comm'n*, the compulsory arbitration provisions of the RLA do not preempt claims premised upon state-law duties in areas of legitimate state concern that are independent of those assumed under the collective bargaining agreement. Otherwise, state regulation would be substantially displaced, or arbitrators would be required to adjudicate issues of state tort law. Neither result is consistent with this Court's cases governing the regulation of labor relations. See, *e.g.*, *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 21, 23 (1987) ("pre-emption should not be lightly inferred," because "the establishment of labor standards falls within the traditional police power of the State[s]" and "does not impermissibly intrude upon the collective-bargaining process"); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53 (1974) (arbitrators exceed their authority if

they premise their decisions on a source of law outside the collective bargaining agreement).[7]

d. Petitioner further contends (Pet. 16) that the court of appeals erred in relying on *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), a case arising under Section 301(a) of the LMRA, 29 U.S.C. 185(a), and not the RLA. We disagree.

Section 301(a) authorizes federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this [Act], or between any such labor organizations." 29 U.S.C. 185(a).[8] The Court in *Lingle* held that Section 301 did not preempt

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[7] We disagree with petitioner's contention (Pet. 18-19) that this Court's reference to the "omitted case" in *Burley*, 325 U.S. at 723, requires every dispute incidental to the employment relationship to be processed through the RLA's exclusive arbitral mechanism. *Burley* described a minor dispute as one that relates "either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." 325 U.S. at 723. As this Court has noted, not all aspects of the contractual relationship between the union and employer are found in the particular provisions of a labor contract; rather, because a collective bargaining agreement must "govern a myriad of cases which the draftsmen cannot wholly anticipate," an agreement's express terms are necessarily supplemented by "practice, usage and custom." *Conrail*, 491 U.S. at 311-312. Properly understood, the "omitted case" merely refers to practice, usage, or custom that becomes part of the contractual relationship that the arbitrator enforces. Petitioner's broader reading of *Burley*—which would displace tort remedies for any dispute arising from railroad or airline employment—is inconsistent with the limited preemptive force of the arbitral provisions of the RLA.

[8] Under this Court's cases, disputes requiring the interpretation of labor contracts covered by Section 301 are governed by federal common law rules that preempt state rules of decision. See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456 (1957); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962). In *Lingle*, this Court addressed the extent to which preemption under Section 301 extends to tort claims arising from the employment relationship.

a state tort of retaliatory discharge for filing a worker's compensation claim. Noting that the elements of the state-law claim consisted of (1) dismissal of an employee and (2) a motive to deter or interfere with his filing a worker's compensation claim, the Court concluded:

> Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge * * *; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement.

486 U.S. at 407. Accordingly, the Court found that the state tort was " 'independent' of the collective-bargaining agreement" because its resolution did "not *require* construing [that] * * * agreement." *Ibid.* (emphasis added).

Lingle supplies an appropriate analogy in this case. To be sure, the standard for preemption articulated under *Lingle*—whether a state law claim requires the interpretation of a labor contract—is articulated somewhat differently from the standard for finding a minor dispute under *Conrail*—whether a dispute may be conclusively resolved by interpreting the collective bargaining agreement. It is also true that the RLA, unlike the LMRA, requires the arbitration of contract claims within its sweep.[9] See *Grote* v. *Trans World Airlines, Inc.*, 905

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[9] That distinction between the RLA and the LMRA should not be overstated. In establishing the framework for determining when a state tort action is preempted under Section 301, this Court confronted the need to "preserve[] the central role of arbitration in our 'system of industrial self-governance.' " *Lueck*, 471 U.S. at 219. The Court noted that the "need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's [preemption] holding in *Lucas*

F.2d 1307, 1309-1310 (9th Cir.), cert. denied, 498 U.S. 958 (1990). Nevertheless, *Lingle* is instructive in the RLA context, because its analysis addresses a question common to both statutes—how to accommodate the federal interest in uniform interpretation of collective bargaining agreements and the legitimate interest of the States in adopting standards of conduct for employers subject to their police power. Compare, *e.g.*, *Lingle*, 486 U.S. at 409 (LMRA "says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of [collective bargaining] agreements") and *Lueck*, 471 U.S. at 212 (because LMRA "does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law," "it would be inconsistent with congressional intent under [Section 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract") with *Colorado Anti-Discrimination Comm'n*, 372 U.S. at 724 (RLA does not preempt state anti-discrimination law).

Accordingly, although it is unclear whether the standards set forth in *Lingle* and *Conrail* would lead to the same result in every case, we believe that the court of appeals properly consulted the policies underlying *Lingle* to assist in defining the line between federal contract claims and tort claims in this case. In any case, because the court's decision was correct under *Conrail*, this case does not require consideration of the practical differences, if any, that may distinguish the *Lingle* and *Conrail* tests.

3. Petitioner argues (Pet. 19-20) that this case warrants further review to resolve a conflict among the

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Flour," and that the standard for preemption under Section 301 must protect the parties' "federal right to decide who is to resolve contract disputes." 471 U.S. at 219. Thus, although RLA preemption protects a direct statutory right to arbitration, LMRA preemption protects a statutory right to contract for an arbitral remedy.

circuits on the question whether retaliatory discharge claims are preempted under the RLA.

a. Petitioner relies (Pet. 20) on several cases holding that a state-law tort of retaliatory discharge is, in effect, a wrongful discharge claim subject to preemption under the RLA. Only one of those cases, however, *Grote* v. *Trans World Airlines, Inc.*, 905 F.2d 1307, 1309-1310 (9th Cir.), cert. denied, 498 U.S. 958 (1990), was decided subsequent to this Court's decisions in *Conrail* and *Lingle*. As set forth, those decisions clarified the proper approach for identifying RLA disputes subject to arbitration under Sections 153 First (i) and 184 and clarified the considerations that distinguish a substantive tort law claim from a claim implicating federal interests in uniform labor contract interpretation. Because this case was correctly decided under *Conrail* and *Lingle*, the earlier court of appeals decisions do not present a conflict warranting further review.[10]

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[10] Petitioner cites (Pet. 20 n.4) a number of decisions finding preemption where the rights asserted under state law were derived from the terms of the collective bargaining agreement. See *Edelman* v. *Western Airlines, Inc.*, 892 F.2d 839, 844-845 (9th Cir. 1989); *Zimmerman* v. *Atchison, T. & S.F. Ry.*, 888 F.2d 660, 662 (10th Cir. 1989) (per curiam); *Hodges* v. *Atchison, T. & S.F. Ry.*, 728 F.2d 414, 416-417 (10th Cir.), cert. denied, 469 U.S. 822 (1984); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367, 1368-1370 (9th Cir.), cert. denied, 439 U.S. 930 (1978). In contrast, respondent's claim is wholly independent of any rights he may have had under the collective bargaining agreement.

Petitioner also relies (Pet. 8) on *Lorenz* v. *CSX Transportation, Inc.*, 980 F.2d 263 (4th Cir. 1992), in which an employee brought a tort action for defamation arising out of statements made by his employer during a grievance adjustment and disciplinary action. We note that the RLA provides for arbitration of disputes "growing out of grievances or * * * the interpretation or application" of the collective bargaining agreement. 45 U.S.C. 153 First (i); see 45 U.S.C. 184. Where an employee files a lawsuit alleging that an employer engaged in misconduct during the grievance process, such a claim may be preempted under the RLA.

b. Although the Ninth Circuit's decision in *Grote* is premised upon a broader view of RLA preemption than the decision below, we do not believe that the differing approaches of the two courts call for the Court's review in this case. For the reasons set forth below, there is a substantial basis to conclude that both circuits may well resolve this issue in the same way in future cases.

i. The basis for the public policy tort alleged by respondent is the right, codified in 45 U.S.C. 152 Third and Fourth, of employees to select a collective bargaining representative without carrier coercion or interference.[11] In *Grote*, the employee alleged state torts of breach of the covenant of good faith and fair dealing, intentional and negligent infliction of emotional distress, and defamation. That distinction is significant. In finding that arbitration represented the employee's sole available remedy, the court in *Grote* emphasized that the result would have been

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Here, however, the dispute turns on the decision to terminate respondent, not the process by which the termination was accomplished.

[11] Section 152 Third provides that neither the carrier nor the employees "shall in any way interfere with, influence, or coerce the other in its choice of representatives." Section 152 Fourth, moreover, states that "[n]o carrier * * * shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and [that] it shall be unlawful for any carrier * * * to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization." This Court has recognized an implied right of action to enforce Section 152 Third and Fourth. See *Texas & N.O. R.R.* v. *Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548, 554-555, 569-570 (1930) (injunctive relief against carrier's interfering with, influencing, or coercing employees in organization and designation of representative); *Virginia Ry.* v. *Railway Employees*, 300 U.S. 515, 543-544 (1937) (dictum). While the Court has never defined in detail the scope of available relief under those provisions, it has indicated generally that when a private right of action is authorized, the Court will "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Franklin* v. *Gwinnett County Public Schools*, 112 S. Ct. 1028, 1032 (1992).

quite different if federal claims had been at issue. 905 F.2d at 1310.

As the court in *Grote* explained (905 F.2d at 1310), this Court in *Buell, supra*, recognized that the RLA's strong policy in favor of arbitration must give way when an employee's cause of action arises from a federal statute "designed to provide minimum substantive guarantees to individual workers." 480 U.S. at 565; see, *e.g.*, *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737 (1981) (policy favoring arbitration under LMRA does not foreclose FLSA claim); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (same for Title VII claim). In *Buell*, the Court held that a railroad employee could maintain an action for negligence under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*, even though that claim may have been subject to arbitration under the RLA. 480 U.S. at 564-567. Because Congress enacted the FELA to provide a remedy for workers injured by an employer's or co-worker's negligence, the Court found it "inconceivable" that Congress intended to limit federal relief to the arbitral remedies for minor disputes under the RLA. 480 U.S. at 565. The Court emphasized, moreover, that the FELA was designed to provide workers with "substantive protection * * * independent of the employer's obligations under its collective-bargaining agreement." *Ibid.*

Consistent with the reasoning of *Buell*, the courts of appeals have uniformly recognized that the RLA's minor dispute mechanism does not displace civil actions based on discrimination against an employee for exercising rights protected by and judicially enforceable under the RLA.[12]

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[12] We note that Section 152 Third and Fourth have force principally in the pre-certification context, when employees are selecting a collective bargaining representative. See, *e.g.*, *Trans World Airlines, Inc.* v. *Independent Federation of Flight Attendants*, 489 U.S. 426, 440-441 (1989). We believe, however, that the force of the RLA's protections logically must extend to representational disputes arising from an employee's efforts to select a new bargaining representative. As is the

See, *e.g.*, *Railway Labor Executives' Ass'n* v. *Boston & Maine Corp.*, 808 F.2d 150, 157-158 (1st Cir. 1986), cert. denied, 484 U.S. 830 (1987); *Roscello* v. *Southwest Airlines Co.*, 726 F.2d 217, 219-220 & n.2 (5th Cir. 1984) (allegation of discharge for union activity, in violation of Section 152, not preempted); *Conrad* v. *Delta Air Lines, Inc.*, 494 F.2d 914, 918 (7th Cir. 1974) (same); *Brotherhood of R.R. Trainmen* v. *Central of Georgia Ry.*, 305 F.2d 605, 607-609 (5th Cir. 1962) (same). Petitioner has not cited, and we are unaware of, any decision holding that a lawsuit to enforce union organizing rights under Section 152 of the RLA is foreclosed by the minor dispute mechanism of the RLA.[13]

ii. In addition, petitioner errs in contending (Pet. Reply Br. 3) that *Buell* is inapposite here, and that arbitration is required, because respondent proceeded on a state-law cause of action.[14] To the extent that petitioner challenges

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case in the pre-certification context, the dispute resolution procedures of the RLA—which are implemented by the carrier and the union—are unlikely to be effective when the allegation is that the employee was penalized by the employer for seeking to organize a new union.

[13] The availability of federal jurisdiction over cases arising under Section 152 Third and Fourth does not undermine the arbitral mechanism of the RLA. Particularly in cases involving an existing bargaining relationship, rather than an attempt to secure representation, a district court must dismiss or grant summary judgment on jurisdictional grounds unless the plaintiff has made and supported substantial allegations of anti-union animus. See, *e.g.*, *National R.R. Passenger Corp.* v. *International Ass'n of Machinists*, 915 F.2d 43, 50-53 (1st Cir. 1990); *Tello* v. *Soo Line R.R.*, 772 F.2d 458, 461-462 (8th Cir. 1985); *International Ass'n of Machinists* v. *Northwest Airlines, Inc.*, 673 F.2d 700, 709-712 (3d Cir. 1982) (district court must look at merits before taking jurisdiction). In establishing a claim under Section 152 Third and Fourth, moreover, the plaintiff bears a heavy burden. See *Trans World Airlines*, 489 U.S. at 440-441; *Virginia Ry.*, 300 U.S. at 549-553.

[14] In any case, while it is true that respondent framed his claim as a state-law tort of discharge in violation of public policy, that claim rested ultimately on federal rights. The Oklahoma public policy tort is available when a discharge "is contrary to a clear mandate of public

the award of state-law relief for a violation of the rights established by Section 152 Third and Fourth, that contention is properly viewed as a claim that those provisions of the RLA preempt state law on the subject matter of unlawful interference with union organizing.[15] Petitioner does not dispute that *Buell* would permit respondent to bring this suit under the RLA outside the arbitral process. See Pet. Reply Br. 3. Nor does petitioner contest that an employee has judicially enforceable rights under Section 152 Third and Fourth. See Pet. 13-14. Thus, petitioner does not in fact contest respondent's right to bring a lawsuit claiming that he was discharged on the basis of anti-union animus; rather, it maintains that that right should have been measured exclusively by federal law.

In our view, the federal cause of action available to redress violations of the RLA preempts a state-law cause of action, such as that asserted here, seeking damages under state law for violations of Section 152 Third and Fourth. The standards of liability and scope of redress available for such violations should be governed exclu-

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policy as articulated by constitutional, statutory or decisional law." *Burk* v. *K-Mart Corp.*, 770 P.2d 24, 28 (Okla. 1989). Here, as we have noted, respondent exclusively alleged violations of federal law. See Pet. C.A. App. Exh. 10, at 1-2 (Second Amended Complaint). In effect, respondent's action is an effort to secure state-law remedies for the federal right—explicitly guaranteed by the RLA—to engage in union organizing without coercion or interference by the employer. See Pet. C.A. App. Exh. 10, at 1 (Second Amended Complaint); Br. in Opp. 3.

[15] Apart from the question whether the arbitral provisions of the RLA preempt a lawsuit to enforce union organizing rights, petitioner presents the distinct question whether the provisions of the RLA that guarantee union organizing rights preempt a state-law cause of action. As we explain below, that issue is not presented in this case, because petitioner did not timely raise it in the courts below.

sively by federal law.[16] As petitioner acknowledges (Pet. 21 n.5.), however, it did not raise the preemptive effect of Section 152 Third and Fourth until its petition for rehearing in the court of appeals. The court of appeals denied the petition without addressing that issue. And, as petitioner notes (Pet. 21), neither this Court nor any court of appeals has squarely addressed that issue. As a result, it is not at all clear that the Tenth Circuit (or any other circuit) would permit the state-law claim alleged here to proceed if this distinct issue of RLA preemption were to be raised and adjudicated in a subsequent case. There is accordingly no conflict that warrants review at this time.

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[16] We do not believe that Congress intended to permit state law to serve as the basis for a judicial remedy for the rights covered by Section 152 Third and Fourth. That view is strongly supported by this Court's decision in *Colorado Anti-Discrimination Comm'n*, 372 U.S. at 724, which held that state anti-discrimination laws are not preempted because the RLA does not address that subject matter. Because Congress spoke with precision to the question of interference with the choice of a bargaining representative, state law should not be permitted to disrupt the careful scheme of relief that Congress crafted under the RLA. Cf. *Wisconsin Dep't of Industry, Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 286 (1986) (to prevent any conflict with the NLRA's "complex and interrelated federal scheme of law, remedy, and administration," principles of NLRA preemption prevent States from "providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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